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IN THE

Supreme Court of the United States

OCTOBER TERM—1956

DOCKET NO. 187

ARTHUR KAPLOW as executor of the estate of ABRAHAM RUTKIN deceased, herein formerly named as James Rutkin,

Petitioner and Appellee below,

v.

JOSEPH REINFELD, SAMUEL BRONFMAN AND ALLEN BRONFMAN, individually, and as co-partners doing business under the style and name of BRONFMAN INTERESTS and BROWNE-VINTNERS CO. INC., RENFIELD IMPORTERS, LTD., and HAROLD C. (SONNY) LEVIN, also known as HAROLD C. RENFIELD,

Respondents and Appellants below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Plaintiff-Respondent,

v.

JOSEPH REINFELD, SAMUEL BRONFMAN AND ALLEN BRONFMAN, individually, and as co-partners doing business under the style and name of BRONFMAN INTERESTS and BROWNE-VINTNERS CO. INC., RENFIELD IMPORTERS, LTD., and HAROLD C. (SONNY) LEVIN, also known as HAROLD C. RENFIELD,

Defendants-Appellants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the executor of the estate of Abraham Rutkin, herein formerly named as James Rutkin, deceased, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of so much of the judgment of that court filed January 25,

1956 in the above entitled action as reversed a money judgment entered upon a jury verdict in favor of James Rutkin, the decedent.

Opinions Below

The opinion of the District Court for the Southern District of New York denying the motions of the several defendants for a directed verdict and to set aside the jury verdict is reported at 122 F. Supp. 265 and is found at pages 2542-2559 of the Appendix to the Brief of the defendants-appellants in the Court of Appeals and submitted herewith. The opinion of the Court of Appeals for the Second Circuit reversing the judgment and dismissing the complaint is reported at 229 F. (2d) 248, and is reprinted herein as Appendix A.

Jurisdiction

The statutory provision conferring jurisdiction on this court is found at 28 U. S. C. 1254(1).

The judgment of the Court of Appeals sought to be reviewed was entered on January 25, 1956 and by order of the Supreme Court of the United States dated April 20, 1956 (annexed hereto as Appendix B), petitioner's time for filing this petition for a writ of certiorari was extended to and including June 21, 1956.

Questions Presented

The Court of Appeals reversed the determination of the District Court jury on two grounds, (a) the failure to bring the suit within the applicable limitation period and (b) the fact that plaintiff's claim for damages arose from alleged fraud concerning the fruits of partnerships conducted in violation of law. Therefore the questions pre-

sented for review must of necessity involve the foregoing considerations of the Circuit Court, and such questions are:

1) Does the applicable statute of limitations of the State of New York operate to bar the maintenance of this action.

2) Does a cause of action for civil conspiracy exist under the decisions of the State of New York.

3) Is the plaintiff's cause of action unenforceable by reason of illegality.

4) In any event did the Court of Appeals commit error in reversing the judgment and dismissing the complaint without ordering a new trial.

Statutory Provisions

The provisions of the applicable constitutional provisions, statutes and rules are set forth verbatim in Appendix C hereof. Such provisions are:

1. United States Constitution, Amendment XVIII
2. United States Constitution, Amendment XXI.
3. New York Alcoholic Beverage Control Law Section 110. (McKinney's Consol. Laws of New York c.3-B,
4. New York Civil Practice Act Section 11.
5. New York Civil Practice Act Section 13.
6. New York Civil Practice Act Section 48-5.
7. New York Civil Practice Act Section 48-8.
8. New York Civil Practice Act Section 49-7.

Statement of the Case

Jurisdiction was conferred on the District Court in the first instance by reason of diversity of citizenship and an amount in controversy in excess of $3,000.

Plaintiff brought suit to recover damages of $22,000,000 resulting from a fraudulent conspiracy among the defendants affecting plaintiff's interest in a partnership and corporation. On the trial of the action testimony and documentation clearly traced the conspiracy as follows:

During a period at least three years prior to 1931 the plaintiff and the defendant Joseph Reinfeld were partners, with others, in the liquor business with a principal office in Newark, New Jersey [53-55].

In or about the spring or early summer of 1931 the plaintiff together with the defendant Joseph Reinfeld representing one half of a liquor partnership, and one Edward Seaman representing the other half of said partnership, while on a visit to Canada [66], were offered the opportunity to purchase the L. L. & B. Distillery in Corporation located in Chatham, Ontario, Canada, by one Marco Leon [69-70]. The aforementioned Seaman rejected any participation in the proposal on behalf of the interest in the partnership he represented [71].

Plaintiff and defendant Joseph Reinfeld believing that the opportunity presented by Leon's offer would provide a Canadian source of whiskey supply in Canada which would be particularly valuable when and if the Prohibition Amendment was repealed [70] agreed with Marco Leon to finance and acquire the control of the L. L. & B. Distillery [72], if members of the partnership did not agree to the acquisition plaintiff & Reinfeld were to take 50% each of the venture [116].

Thereafter, to consumate the purchase, Reinfeld designated his attorney, David Popik, a member of the Bar

of the State of New Jersey. [72, 74]. By written documents (which defendants denied existed) plaintiff established that Joseph Reinfeld did acquire control of the L. L. & B. Distillery and of its stock and records (Pltf's. Exs. 25 A-L). At that time, the L. L. & B. Distillery was in dire need of funds and two mortgages had been placed on its property (Pltf's. Ex. 17). To relieve the situation immediately, litigation then pending, particularly foreclosure of the aforementioned mortgages, had to be stayed, and for that purpose, Joseph Reinfeld immediately undertook and did acquire said mortgages (Pltf's. Exs. 14, 15). Thereafter, through the cooperation of Marco Leon a liquor license for the distillery was issued in September 1931 [646, Pltf's. Ex. 32].

The defendant Samuel Bronfman having learned of the transaction and realizing that his largest customer for the purchase of liquor in Canada, namely, Joseph Reinfeld and his associates, were to acquire a distillery and ultimately become a competitor of his company (the Distillers Corporation—Seagrams, Ltd.), conspired with the defendant Joseph Reinfeld to bring about a breach of the agreement to purchase and finance the L. L. & B. Distillery. Joseph Reinfeld's attorney, David Popik, made every effort to conceal the activities of the corporation from Marco Leon, one of the principal stockholders of the L. L. & B. Distillery (687, Pltf's. Exs. 68, 69).

Instead of proceeding with the plans to reorganize the L. L. & B. Distillery and provide it with working capital as planned [646, 652-3], the defendant Joseph Reinfeld advised Marco Leon that he was no longer interested in acquiring and reorganizing the L. L. & B. Distillery and fraudulently induced Leon to reacquire control of the said distillery [688, 689]. Thereafter the distillery, on December 15, 1931 was returned to Leon and the sum of $14,000 paid to Leon, by Reinfeld's attorney, David Popik, for Leon's expenses in connection with the contemplated corporate reorganization. Popik at that time did not disclose

that the said $14,000 was actually paid by Samuel Bronfman [690].

Unknown to Marco Leon, on the same day he signed the release, the property of L. L. & B. was sold in a foreclosure sale to nominees or dummies of Samuel and Allen Bronfman or corporations which they controlled [696-697].

At the time of the foreclosure sale the L. L. & B. Distillery owned its own buildings was completely equipped with storage vats and new copper stills and was in a position whereby it could have been placed in operation in a matter of hours [640, 649].

As a result of the fraud practiced upon Leon, he received a corporate shell without assets and did not learn until months later that on the same day he reacquired control of L. L. & B., its property had been sold to Bronfman interests [690, 692].

Plaintiff was unaware of the fraud practiced on Leon and when he questioned the defendant Joseph Reinfeld about the L. L. & B. Distillery, he completely relied on Reinfeld's answer that he (Reinfeld) had agreed to let Samuel Bronfman have L. L. & B. "dollar for dollar" after the said Bronfman had "got me drunk" [76].

The partnership, plaintiff and defendant Joseph Reinfeld amongst them, continued in business; and preparing for the Repeal of the Prohibition Amendment, set up a corporation to engage in the wholesale liquor business under the name of the Knickerbocker Exporting Company, Inc., which name was changed shortly thereafter, to Browne-Vintners Co., Inc. [78, 79], a company in which plaintiff, through nominees had a 6% interest [155].

Plaintiff established that Atlas Shipping Company, a Bronfman owned enterprise, was a stockholder of the former company, a fact which defendant Samuel Bronfman

utterly denied and could not explain when confronted with the evidence (969, 970, 971). The interest of the partners was then carried over into the corporation but Joseph Reinfeld continued to represent his erstwhile partners and dominated and controlled, and continued to dominate and control, the affairs of the corporation (80, 81-82).

Other corporate opportunities were brought to the attention of and acquired by Joseph Reinfeld as the manager and director of Browne-Vintners, such as the "Wilson" whiskey trade name in 1935 (87-88), and Hunter Distilling Company in 1938 (88-89). On each occasion the ubiquitous defendants Samuel Bronfman and his brothers or the corporations with which they were affiliated mysteriously obtained a half interest in each of the said ventures. Gallagher & Burton was brought to Joseph Reinfeld's attention in 1940 as a desirable asset for acquisition (90-91) but rejected by him and shortly thereafter Gallagher & Burton was purchased by Samuel Bronfman or one of his affiliated companies (91), and, finally in 1940, on Reinfeld's insistance that Rutkin "go along" with the plan (108), the Browne-Vintners Co., Inc., which was the receptable for the aforesaid business opportunities, was sold lock, stock and barrel to Samuel Bronfman's company (110, 988-999).

At the time of the sale Browne-Vintners had the exclusive agency for such "Blue chip" brands of liquor as Cointreau, Piper Heidsick, Remy-Martin. The contract of sale between Browne-Vintners and the Distillers Company recited that these agencies would be transferred as part of the consideration for the sale (Pltf's. Ex. 3).

Joseph Reinfeld received an employment contract at $50,000 yer year for five years and his son-in-law, Harold C. Levin, also known as Sonny Reinfeld, also received a five year employment contract at a salary of $25,000 per year. At the time of the sale Joseph Reinfeld "purchased" more than $1,000,000 worth of stock of Distillers-

Seagrams. Sometime before the employment contracts had expired by their terms, Joseph Reinfeld and his son-in-law Harold C. Levin, formed Reinfeld Importers, Ltd., secured their release from Browne-Vintners Co., Inc., with the consent of Samuel Bronfman and acquired the agencies theretofore transferred and conveyed to the new Browne-Vintners Corporation (Pltf's. Exs. 4 and 5; Defts'. Exs. W and X).

The defendants Reinfeld and Levin and another former officer of Browne-Vintners, Samuel Lentz, entered into a non-competing agreement for ten years. However, significantly, it was specifically agreed with respect to Reinfeld and Levin that after the expiration of the employment agreement between Reinfeld and Levin and Browne-Vintners, Reinfeld and Levin could engage in the business of importing bottled alcoholic beverages into the United States (2576, 2582, 2586-2587, 2592).

In 1943, some two years after the sale of Browne-Vintners, plaintiff received the sum of $250,000 and signed a general release of his interest in Browne-Vintners, to which payment and release further reference will hereinafter be made (128-130, Pltf's. Ex. 2).

In 1946 plaintiff, in a restaurant in Newark, New Jersey, happened to meet Joseph Facher and Morris Kanengeiser, former partners of the plaintiff and the defendant Joseph Reinfeld, who questioned plaintiff regarding the L. L. & B. Distillery (132). They were anxious to know what he received from the Bronfmans because, as they informed plaintiff, they understood that in 1931, when they asked Joseph Reinfeld (1960, 1961-1962) concerning the disposition of L. L. & B. Distillery, Joseph Reinfeld stated that he was to get from the Bronfmans 150,000 to 250,000 shares of Distillers-Seagrams' stock (1924, 1946). The information thus imparted to the plaintiff caused him to undertake an investigation with respect to the L. L. & B. transaction (132-134).

After a visit with his attorney to Montreal, Canada, Rutkin learned that Charles Burns, one of the principal stockholders in the L. L. & B. Distillery in 1936 instituted an action against Samuel Bronfman, charging Samuel Bronfman and his brothers with inducing Joseph Reinfeld to breach the contract of purchase above referred to. That action was settled for at least $35,000, $10,000 of which came from Samuel and Allen Bronfman and $25,000 from Joseph Reinfeld (701-717).

An exhaustive investigation was then conducted into the various transactions which then revealed for the first time to the plaintiff, who had implicit trust and confidence in his partner Joseph Reinfeld, of the fraud and deceit which had been practiced by Joseph Reinfeld and Samuel Bronfman and Allen Bronfman with relation to plaintiff's interest in the various transactions referred to above.

On July 1, 1948 plaintiff instituted this action.

Reasons for the Allowance of the Writ

There are several reasons why this writ should be granted, but most prominent among them are:

1. The Court of Appeals for the Second Circuit reversed the judgment of the District Court on principles contrary to the authority of the decisions of the highest court of the State of New York.

2. In spite of the fact that the jury had returned a general verdict for the plaintiff herein, the Court of Appeals for the Second Circuit departed from the usual procedure, reversed the Trial Court's determination and dismissed the complaint, when it should have ordered a new trial.

3. The erroneous holding of the Court of Appeals for the Second Circuit has prostituted the jury determination and prevented the vindication of the deceased Rutkin's rights.

Argument in Support of Reasons

The two stated grounds for reversal by the Court of Appeals were: (1) the action was barred by the applicable New York Statute of Limitations, and, (2) the action was barred by reason of illegality. We will treat each in its turn.

I. As to the Applicable Statute of Limitations of the State of New York.

1. The jury in this case found that the plaintiff, James Rutkin, had been the victim of a conspiracy, on the part of the several defendants to defraud him of his interest in the L. L. & B. Distillery and of his interest in Browne Vintners. This result was reached by the district court jury despite its full knowledge that the plaintiff, James Rutkin, had been convicted, by a United States District Court in New Jersey, of income tax evasion on the testimony of Joseph Reinfeld that James Rutkin had not been his partner in Browne-Vintners. *United States* v. *Rutkin*, 1952, 343 U. S. 130, 72 S. Ct. 571, 96 L. Ed. 833.

The finding in this case, directly opposite to that in the earlier criminal prosecution of James Rutkin, amply bears out the observation of Mr. Justice Black of this Court, on page 147 of 343 U. S.:

> "My study of this record leads me to believe that the fantastic story of supposed extortion told here would probably never have been accepted by a jury if presented in a trial uncolored by the manifold other inflammatory matters which took up 887 of the 900 pages in this 'tax evasion' case."

In this the jury found that the facts presented a unitary wrong—that of a civil conspiracy to defraud plaintiff—made actionable by the attainment of two of its objectives.

The Court of Appeals, however, in reversing the lower court, inferentially decided that no cause of action for civil conspiracy existed in New York, that it was only damage produced by overt acts which was cognizable as an action, citing *Nalle* v. *Oyster*, 1913, 230 U. S. 165, 182, 33 S. Ct. 1043, 57 L. Ed. 1439; *Lewis Invisible Stitch Mach. Mfg. Co.* v. *Columbia Blindstitch Mach. Mfg. Corp.*, 2 Cir., 1936, 80 F. 2d 862, 864, as authority.

Overlooking, for the minute, the applicability of the above cited cases to the facts in the instant case, the question of civil conspiracy was recently passed upon by the Court of Appeals of the State of New York wherein it unanimously held in *Duane Jones Company, Inc.* v. *Burke*, 1954, 306 N. Y. 172, 117 N. E. (2d) 237, at page 190 of the official reporter:

> "That pleading contains allegations *sufficient in law to allege a cause of action for conspiracy* against the defendants other than Burke and Manhattan * * *."

Earlier, the same Court of Appeals for the State of New York in *Keviczky* v. *Lorber*, 1943, 290 N. Y. 297, 49 N. E. (2d) 146, 146 A. L. R. 1410 sustained a determination that an action for civil conspiracy did exist and was actionable.

See also:

> *Green* v. *Davies*, 1905, 182 N. Y. 499, 505, 75 N. E. 535.

A civil conspiracy is an agreement or confederation of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose not in itself unlawful by unlawful means. *Cooper* v. *Maurer*, 1942, 37 N. Y. S. 2d 993, 996. Since it has been found that a conspiracy may exist over a period of years, it should also follow that a conspiracy is a continuing wrong. *Breese* v. *United States*, 1913, 203 F. 824. A continuing

wrong, is in the nature of nuisance or a continuing trespass. *Hunt* v. *Hunt,* 1934, 152 Misc. 364, 273 N. Y. S. 194, aff'd 242 App. Div. 721, 273 N. Y. S. 436. Blackstone considered trespass to embrace the principles of a tortious wrong committed against individuals or their property. Blackstone, Volume III, Chapter Twelfth. In this case, the continuing trespass to property of an individual was present *with* the additional elements of actual fraud. With abundant proof in support of the allegations of a fraudulent conspiracy presented, the trial court correctly construed the applicable statute of limitations as that found in Civil Practice Act, Section 53. There could be no other choice. Conspirators do not advertise. To the contrary, every effort is made, as was the case here, to conceal the underhanded activity—and until the objective is attained or abandoned, the victim in all likelihood, is completely unaware of the conspiracy. Simple logic calls for the application of a period of limitation to that time when the conspiracy is revealed or made known to the victim. *Cooper* v. *Maurer, supra.*

The *Nalle* and *Lewis Invisible Stitch* cases (*supra*) relied on by the Circuit Court are not determinative of the facts of this case, nor do they have application to the issue as to whether or not a cause of action for civil conspiracy exists. A careful reading of both cases makes readily apparent that neither the United States Supreme Court in the *Nalle* case or the Circuit Court for Second Circuit deny the existence of the action of civil conspiracy. Much to the contrary, in the *Nalle* case (230 U. S. 165) at page 180, the Supreme Court simply stated:

> "But the well settled rule is that no civil action lies for a civil conspiracy *unless* there be an overt act which results in damage to the plaintiff." (Emphasis added.)

In the *Lewis* case (80 F. 2d 862) a similar statement appears at page 864.

The New York Court of Appeals has held that a cause of action exists for a civil conspiracy. Under the *Erie* v. *Tompkins* decision (1937, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188), it is conceded that the federal forum must apply the conflict of laws rule of the state in which it sits; and that states conflicts of laws rule on applicable periods of limitation. *Guaranty Trust Co.* v. *York*, 1945, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2029.

In this case, New York Law was found to be applicable by both the District and Circuit Courts. Since this was so, both Courts were compelled to apply the state rules defining the type of action cognizable by that state's courts and the limitation statutes pertaining thereto. Yet this is precisely what the Circuit Court failed to do.

New York Civil Practice Act Section 53 has application to limitations on causes of action for civil conspiracy. That section provides a period of ten years from the date of the accrual of the cause of action, for types of action not specifically prescribed for in other portions of Article 2 of said act.

In this case, the jury, answering the trial court's interrogatories, found that the plaintiff did not learn of the existence of part of the conspiracy to defraud him of his interest until 1946, and, that only in 1948 did the complete extent of the scheme become known to him [2548-2549]. What was said in *Breese* v. *United States*, 1913, 203 F. 224, 230; and *Eldredge* v. *United States*, 1932, 62 F. 2d 449, 541, that a conspiracy continues "until its purpose is fully affected or until it has been abandoned", applies with equal force to this case. A civil conspiracy is a continuing tort wherein the statute similarly runs from the time its purpose is fully effected or it is abandoned. Proof demonstrates here that the conspiracy was operative until 1948. Therefore, this action was timely brought.

2. Even assuming, *arguendo*, that New York Civil Practice Act Section 53 is not applicable, the action was none-

theless timely brought, when it is construed as an action based on actual fraud, because it was commenced within six years after the discovery of the elements of the fraud. N. Y. Civil Practice Act Section 48 subd. 5.

The fact that the jury, in answer to the interrogatory, "(3) Approximately at what time should plaintiff have become aware of such claim in the exercise of reasonable care?", replied, "Between December 1931 and December 1932", would not operate to bar an action on the L. L. & B. claim started in 1948. The testimony amply shows that a partnership relation, embodying mutual faith and trust, existed between the plaintiff and defendant Reinfeld. In a partnership relationship, such clews, which would cause persons dealing at arms length to promptly make inquiry, would not serve to put a person dealing with another in a fiduciary capacity on guard. The very fraudulent conduct practiced by the defendant rendered plaintiff's diligence vain and as such, defendant can not fairly assert or insist on the bar of the statute of limitations. *Holmberg* v. *Armbrecht*, 1945, 327 U. S. 392 at page 396; 31 Mich. L. Rev. 591. See: *Mannaberg* v. *Klausner*, 1945, 269 App. Div. 682, aff'd 294 N. Y. 859, where the Court held that the statute of limitations applicable to fraud practiced by a member of partnership on another member thereof, was six years from the date of the discovery of the fraud.

3. Again, assuming *arguendo*, that the L. L. and B. claim was barred by any statute of limitations, the action was still timely brought on the Browne-Vintners claim. The jury specifically found with respect to the Browne-Vintners claim that the plaintiff discovered the existence of the claim in January 1948 and that he should have discovered it sometime in 1947. Under New York Civil Practice Act, Section 48, subd. (5) actions for fraud are timely brought if started within six years after the discovery of the elements of the fraud. Since the supple-

mental complaint setting up the Browne-Vintners claim herein was filed in 1951, the institution of suit on this claim was well within the prescribed period.

4. The Circuit Court's construction of the plaintiff's claim as one under New York Civil Practice Act, Section 48, subd. (8), to which a three year limitation applies, and which accrues to a stockholder on the date of the misfeasance by the corporation, completely casts aside the evidence of the intent of the partners and runs away from the plain facts of the case. Plaintiff here claimed and proved that his interest in the old partnership was carried over into Browne-Vintners. Whether he owned Browne-Vintners stock in his own name or had a right to stock therein is not the point. The precise point is that Rutkin owned some part of that portion of Browne-Vintners owned by Reinfeld and his nominees. Reinfeld was not sued because he was an officer of Browne-Vintners. He was made a defendant because of the continuing fraud practiced by him on plaintiff. The defendant Browne-Vintners is joined as a defendant merely because it assisted the defendant Reinfeld in carrying out the fraud practiced on the plaintiff.

5. In any event, even if we admit that a separate claim on L. L. and B. is barred by a statute of limitations, since the jury returned a general verdict and as such necessarily considered and passed upon plaintiff's proof that the part of consideration for the second (Browne-Vintners) claim was defendant Reinfeld's participation in the 1931 L. L. and B. transaction, and further found that the plaintiff became aware of the Browne-Vintners claim only in 1948, the supplemental complaint served in 1951 was well within the six year statutory period set forth in Civil Practice Act, Section 48, subd. 5.

II. As to the illegality.

a. The L. L. and B. transaction

1. The evidence did not indicate an illegal act in the planned acquisition of the L. L. and B. Distillery by the liquor partnership sometime in 1931, prior to Repeal of the Prohibition Amendment. The erroneous assumption by the Circuit Court, apparently drawn from plaintiff's cross-examination [289-290], that the intent underlying the acquisition of the distillery was for the immediate importation of liquor into the United States, is in utter disregard of other pertinent testimony. Immediately prior to the Canadian trip to negotiate for the distillery, plaintiff, Reinfeld and others had traveled to Europe with the express purpose of obtaining agencies such as Pieper-Heideick, Cointreau and others for this country *after* repeal [59-61]. The L. L. and B. transaction contemplated Repeal as well. But even if it did not, the distillery was located in Canada, the liquor was to be distilled there, and, at the very worst, was to be shipped to a point in Canada [71]. The fact that the distillery was equipped so that it could turn out whiskey within six months [289-290] does not destroy the legality of the proposed undertaking. Although limited by subsequent decisions, the rule laid down in *American Banana Co.* v. *United Fruit Co.*, 1908, 213 U. S. 347, 29 S. Ct. 511, 53 L. Ed. 826, has application to this case and is controlling. Support is also found in such decisions as: *The Talus*, 1918, 248 F. 670, aff'd 248 U. S. 185; *Scudder* v. *Union National Bank*, 1875, 91 U. S. 406; *Commissioner of Internal Revenue* v. *Hyde*, 1936, 82 F. 2d 174.

Even if after Repeal shipments of liquor were to be made into the United States from the L. L. and B. Distillery the validity of the contract could not be altered by the fact that it was entered into prior to the prohibition repeal. *Anglo-Continentale Treuhand, A. G.* v. *St. Louis*

S. W. Ry. Co., 1936, 91 F. 2d 11, 12, cert. denied 298 U. S. 655.

The repeal of an amendment annuls and destroys for all time the restrictions it imposed. *Rains* v. *Contra Costa County*, 231 P. 2d 55, 56, 57; and see also: *United States* v. *Chamber*, 1933, 291 U. S. 217.

Decisions in the State courts of New York permit a recovery on suits, brought after the repeal or modification of a prohibitory law, involving agreements which were illegal and void at the time of making. *Lido Capital Corp.* v. *Eskelsen*, 1936, 162 Misc. 323, 295 N. Y. S. 163; *Lido Capital Corp.* v. *Vogel*, 1936, 161 Misc. 48, 291 N. Y. S. 92; *Block* v. *Frankport Distillery Co.*, 1936, 247 App. Div. 864, 288 N. Y. S. 749, aff'd without opinion 273 N. Y. 469, 6 N. E. 2d 408; *Farber* v. *Acquino*, 1938, 253 App. Div. 600, 3 N. Y. S. 2d 236; and while New York is in the minority in its view (126 A. L. R. 699) such view is still the one which a federal forum sitting in this state must apply.

The *Fitzsimons* case cited by the Circuit Court as authority for the broad statement that, "The L. L. & B. transaction having been spawned in illegality, the later repeal of the Eighteenth Amendment did not open the doors of the courts to the plaintiff", is clearly distinguishable and inapplicable. (*Fitzsimons* v. *Eagle Brewing Co.*, 1939, 107 F. 2d 912, 126 A. L. R. 681.) The *Fitzsimons* case was an action for the price of goods sold in this country in violation of the prohibition laws—a totally alien situation than that concerned with here. It was also a case decided in another circuit. The cases cited after the *Fitzsimons* case all involve violations of the O.P.A. maximum price laws. Those statutes, when rescinded, were done so with express saving clauses which preserved the right to impose penalties and enforce liabilities which accrued during the existence of price control. *Toll* v. *Friedman*, 1947, 272 App. Div. 587, 74 N. Y. S. 2d 176. This was not the case with the Repeal of the Eighteenth Amendment.

2. The basic and all permeating error of the Circuit Court was that it placed too much stress on the word "bootleg", and considered everything associated with the noun illegal. Admittedly, in catering to the taste of a small portion of the American public prior to Repeal, Rutkin, Reinfeld, and others violated the prohibition laws, but that fact of and in itself does not prevent the making of a valid agreement, cognizable by law, between two such parties. The agreement which plaintiff shows existed between Reinfeld and himself as concerns L. L. and B. was not illegal of itself. *McMullen* v. *Hoffman*, 1899, 174 U. S. 639, and other cases cited by the Circuit Court in support of its reversal are not applicable. In those cases, the very fruit sought by the litigant was a benefit stemming from an illegal agreement. This is not so here.

b. Browne-Vintners

3. In stating as a ground for reversal the failure of plaintiff to include his name on the Browne-Vintners application to the New York State Liquor Authority the Circuit Court completely overlooked the fact that it was the very same defendant Reinfeld who, in furtherance of the conspiracy, told him that his name could not be included on such application and in reliance on Reinfeld statement, permitted his name to be withheld. The very party who prevented compliance with the state statute can not assert the failure of the other to comply therewith as a ground for denying recovery. *Miseveth* v. *Pribishuk*, 1948, 85 N. Y. S. 2d 595; 32 A. L. R. (2d) 1375n, 1404n.

Even so, a reading of the provisions of the application referred to [Pltf's. Exs. 8 & 8A] clearly show that only in the case of a stockholder owning more than 10% of the stock of the corporation must his identity be revealed (see question 5-d). The reliance on questions 13 and 14 of said application by the Circuit Court is misplaced. Those questions request the *applicant* to state who is interested.

It *is the applicant* who has failed to comply, not the person whose name is unlisted. Surely it can not be seriously urged that a corporation, at the time of application, must at its peril be obliged to list all its stockholders or those who *will become* stockholders sometime in the future. This is extreme to which the construction urged by the Circuit Court leads. But assuming plaintiff did knowingly withhold his name from the application, it still would not prevent recovery for such failure was not a basic part of his claim for fraud in the sale of Browne-Vintners. In the case of *Rosasco Creameries, Inc.* v. *Cohen*, 1937, 276 N. Y. 274, 11 N. E. 2d 908, 118 A. L. R. 641, where a contract for the sale of milk by an unlicensed dealer was involved, the Court of Appeals said:

> "If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied".

Similarly here, Section 110 of the Alcoholic Beverage Control Law does not inhibit the right of a party, who has suffered damages directly as a result of a continuing series of fraudulent acts, when only one step in the series related to the corporate entity subject to regulation.

The *Flegenheimer* v. *Brogan* case (1940, 284 N. Y. 268, 30 N. E. 2d 591, 132 A. L. R. 631) was stressed as a reason for reversal. It is clearly distinguishable. In that case, the widow of Flegenheimer (Dutch Schultz) sought to enforce a contract wherein her husband was the sole, but secret, owner of a liquor corporation. The liquor application had been taken out in the name of defendant, whereas the real party in interest was Flagenheimer. There the court properly refused recovery. In this case Reinfeld told plaintiff his name could not be revealed and Rutkin

relied on that statement. It formed another act in the fraudulent conspiracy conducted above the level of the Browne-Vintners Corporation and the application for a license.

The foregoing forcibly illustrates the gravamen of the errors of the Circuit Court, which in the interests of justice, should compel a review of this case upon the issuance of a writ of certiorari.

CONCLUSION

It is therefore respectfully submitted that this is a case calling for the exercise of the discretionary powers of this court in granting the issuance of the writ of certiorari to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 14, DOCKET 23455

(Argued November 7, 1955 Decided January 25, 1956)

JAMES RUTKIN,

Plaintiff-Respondent,

v.

JOSEPH REINFELD, SAMUEL BRONFMAN and ALLEN BRONFMAN, individually, and as copartners doing business under the name and style of BRONFMAN INTERESTS and BROWNE-VINTNERS CO., INC., RENFIELD IMPORTERS, LTD., and HAROLD C. (SONNY) LEVIN, also known as HAROLD C. RENFIELD,

Defendants-Appellants.

Before: CLARK, Chief Judge, and LUMBARD and WATERMAN, Circuit Judges.

LUMBARD, Circuit Judge.

From a judgment against them on a jury verdict for $77,200, which with interest from January 15, 1947 totals $115,116.69, the four individual and two corporate defendants appeal on numerous grounds. We consider two of those grounds sufficient to require reversal of the judgment —namely, the failure to bring suit within the applicable limitation period and the fact that the plaintiff's claims for damages arise from alleged fraud concerning the fruits of partnerships conducted in violation of law.

Appendix A.

The jury having found that the defendants had conspired to the plaintiff's injury as stated in the pleadings, a summary of the pleadings sufficiently poses the questions which are determinative of this appeal. Such evidence as is material to the two grounds of our decision will be further stated.

The 1948 Complaint and the 1951 Supplemental Complaint

On July 1, 1948 Rutkin filed his complaint invoking federal jurisdiction because of citizenship diverse from the defendants therein named, Joseph Reinfeld; Samuel, Abraham, Harry and Allen Bronfman; and Distillers Corporation Seagrams, Ltd. The complaint made these allegations: Rutkin and Reinfeld had been partners prior to May 1931 and had equal shares in a plan to purchase and operate L. L. & B. Distillers, Ltd., a distillery in Ontario, Canada. Reinfeld commenced negotiations with L. L. & B. to finance and purchase a controlling interest and on July 2, 1931 he agreed for the partnership to invest $500,000, including the purchase of a first and second mortgage on the distillery. He purchased the first mortgage and made payments on the second mortgage. On the next day Reinfeld conspired with Samuel and Allen Bronfman to enrich himself and them and to deprive Rutkin of his share of the profits. To induce Reinfeld to break his agreement with L. L. & B. the Bronfmans gave Reinfeld stock of Distillers-Seagrams and "other emoluments" and all agreed to keep this secret from Rutkin. This was of benefit to the Bronfmans because L. L. & B. was in competition with the Bronfman company, Distillers-Seagrams. The distillery was sold on the second mortgage foreclosure; the stock which Reinfeld had acquired was sold to a Bronfman nominee; and Reinfeld was to be indemnified against any loss or expense.

Reinfeld advised Rutkin that the partnership interest in L. L. & B. had been sold to the Bronfmans for the amount the partnership had paid for it and that it had been done in good faith. Reinfeld thus falsely represented the situation to Rutkin to prevent his inquiry so that the fraud was not discovered until May 27, 1946. Rutkin, never having received his share of the benefits from Reinfeld, asked $22,000,000 damages.

The supplemental complaint, filed November 13, 1951, joined Browne-Vintners Co., Inc., Renfield Importers, Ltd., and Harold C. Levin, also known as Harold C. Renfield, as additional defendants. It alleged that: Rutkin and Reinfeld as partners owned a majority interest in Reinfeld's name and in the names of dummies in the Browne-Vintners Co., Inc., a New York corporation in existence from 1933 until 1940 (referred to as Browne-Vintners Old). The defendants agreed in December 1940 that Reinfeld would cause the business and assets of Browne-Vintners Old, including the Cointreau, Piper Heidsieck and Remy Martin agencies which it held, to be sold to Distillers-Seagrams for an inadequate price, and the proceeds of the sale were distributed to the stockholders of Browne-Vintners. Reinfeld received secret emoluments which the defendants fradulently concealed from the plaintiff. Rutkin did not discover until after July 1, 1948 that the Cointreau, Piper Heidsieck and Remy Martin agencies had been transferred to Renfield Importers, Ltd. of New York which was controlled by Reinfeld and defendant Harold C. Renfield, and Rutkin did not receive his share of these benefits. This transfer of the agencies was without Rutkin's knowledge and it was part of the consideration to Reinfeld for his 1931 double-dealing on the L. L. & B. transaction. Reinfeld concealed from Rutkin the extent of Rutkin's interest in Browne-Vintners Old and fraudulently caused Rutkin to execute a general release as a result of which certain payments were made to Rutkin.

Appendix A.

Further allegations that the defendants caused Rutkin's conviction for violation of the federal income tax laws, Rutkin v. United States, 1952, 343 U. S. 130, 72 S. Ct. 571, 96 L. Ed. 833 are not pertinent here as they were dismissed by the trial judge.

The defendants' answers, in addition to general denials, pleaded affirmative defenses of the limitations statutes of New York and Canada, an assignment to Reinfeld of Rutkin's interest in Browne-Vintners Old and a release executed by Rutkin in 1943.

Upon the argument of motions to dismiss at the end of plaintiff's proof the defendants also urged the illegality of the L. L. & B. and the Browne-Vintners Old transactions, and this was again urged at the conclusion of all the evidence.

The trial judge, although he refused to submit to the jury special questions regarding the illegality of the L. L. & B. and the Browne-Vintners Old transactions as requested by counsel for the Bronfmans, did put to the jury special questions bearing upon the statutes of limitations defenses which the jury answered thus:

1. With respect to the L. L. & B. transaction:

(A) The claim arose December 15, 1931.

(B) Plaintiff became aware of the claim in May 1946.

(C) Plaintiff should have become aware of the claim in the exercise of reasonable care between December 1931 and December 1932.

2. With respect to the Browne-Vintners Old transaction.

(A) The claim arose December 20, 1940.

(B) Plaintiff did not become aware of the claim until January 1948.

(C) Plaintiff should have become aware of the claim in the exercise of reasonable care some time in 1947.

Appendix A.

The trial judge, having reserved decision on the motions to dismiss made at the close of plaintiff's case, and later at the close of all the evidence, gave further consideration to those motions together with timely motions to set aside the verdict and enter judgment in favor of the defendants. He denied all motions in an opinion reported at 122 F. Supp. 265.

The Application of the Statutes of Limitation

[1] Since jurisdiction in this case is based on diversity of citizenship we must apply the New York law in determining which statute of limitations to apply. Klaxon Company v. Stentor Electric Manufacturing Co., 1941, 313 U. S. 487. Section 13 of the New York Civil Practice Act provides that where a cause of action accrues outside New York and the plaintiff is not a resident of New York, the claim cannot be asserted if barred by the limitations statute of either New York or the place where the action arose. Although it appears here the L. L. & B. claim would be barred by a Canadian statute shorter than that of New York, we need not rule on that point since both claims asserted by the plaintiff are barred by the applicable New York statutes.

The trial judge applied the New York statute of six years, New York Civil Practice Act, § 48, subd. 5, to what he described as the jury's finding of a single conspiracy which continued from 1931 to 1947 and held that the statute ran from some time in 1947, the time when the jury found that the plaintiff in the exercise of reasonable care should have been aware of the Browne-Vintners Old transaction. The judge applied the rule of criminal conspiracy where the statute runs from the last overt act. We cannot agree with this application of the law to the facts of this case.

[2, 3] Section 11 of the New York Civil Practice Act provides that periods of limitation must be computed from

"the time of the accruing of the right to relief by action, special proceeding, defense or otherwise * * *" The damage for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific overt acts. Nalle v. Oyster, 1913, 230 U. S. 165, 182, 33 S. Ct. 1043, 57 L. Ed. 1439; Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corp., 2 Cir., 1936, 80 F. 2d 862, 864. The charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible in damages for any overt act or acts. The person harmed by the conspiracy may bring suit as soon as the damage to him is inflicted; he obviously need not wait until the termination of the conspiracy which caused it. It is at the time of injury that the "right to relief by action" arises and the statute therefore begins to run at the moment such injury occurs. Momand v. Universal Film Exchanges, 1 Cir., 1948, 172 F. 2d 37, 49, certiorari denied, 1949, 336 U. S. 967, 69 S. Ct. 939, 93 L. Ed. 1118; Park-In Theatres v. Paramount-Richards Theatres, D. C. Del. 1950, 90 F. Supp. 727, 729, affirmed 3 Cir., 1950, 185 F. 2d 407, certiorari denied, 1951, 341 U. S. 950, 71 S. Ct. 1017, 95 L. Ed. 1373; Williamson v. Columbia Gas & Electric Corp., 3 Cir., 1950, 186 F. 2d 464, 469, certiorari denied, 1951, 341 U. S. 921, 71 S. Ct. 743, 95 L. Ed. 1355. The Momand case points out the important distinction between the rule applicable in civil and that applicable in criminal cases.

a. The L. L. & B. Claim

[4] The statute started running against the L. L. & B. claim in 1931, or at the latest, December 1932, when the jury found that the plaintiff should have become aware of the claim in the exercise of reasonable care. Higgins v. Crouse, 1895, 147 N. Y. 411, 416, 42 N. E. 6. Any cause

of action arising out of the L. L. & B. transaction could not be kept alive by alleging that it was all part of a conspiracy which went on for many years and as a result of which Reinfeld secretly received certain benefits from the other defendants in 1940 and thereafter. No allegation of conspiracy can thus jump an eight or nine year gap to make a shambles of the statute of limitations and pervert its salutary purpose to set stale claims at rest. Were this not so any bargain which turned out advantageously to the purchaser might be challenged upon a charge of conspiracy made years afterward if any other parties to both sides of the transaction subsequently had further advantageous business dealings with each other. We hold that the plaintiff was barred from bringing suit on the L. L. & B. transaction long before he brought the action in 1948.

b. The Browne-Vintners Old Claim

[5] Nor is the claim regarding the sale of Rutkin's interest in Browne-Vintners Old and the transfer of the Cointreau, Piper Heidsieck and Remy Martin agencies one which Rutkin may prosecute under his 1948 complaint or his supplemental complaint filed in November 1951. If this was a wrong, it was a wrong suffered not by Rutkin but by a New York corporation, Browne-Vintners Co., Inc. Whether suit is brought by that corporation, or by a stockholder (assuming for the moment that Rutkin was such an owner of a stock interest as to give him any legal standing to enforce such a claim) such suit is governed by § 48, subd. 8 of the New York Civil Practice Act which requires that suit be commenced within six years after the action accrues. Hastings v. H. M. Byllesby & Co., 1944, 293 N. Y. 404, 411-412, 57 N. E. 2d 733, certiorari denied sub nom. Hastings v. Haystone Securities Corp., 1945, 324 U. S. 860, 65 S. Ct. 864, 89 L. Ed. 1417. The sale

of Browne-Vintners, to which Rutkin consented in advance, took place on December 20, 1940. The fact that the plaintiff alleges fraud which was not discovered until a later time does not bring the claim within § 48, subd. 5, so that the statute is tolled until the discovery of such fraud. Zwerdling v. Bent, 1943, 291 N. Y. 654, 51 N. E. 2d 933. The gravamen of the action is still a breach of duty by those in control of the corporation and the appropriate limitation period is that prescribed by subd. 8 of § 48. Hastings v. H. M. Byllesby & Co., supra, 293 N. Y. at pages 411-412, 57 N. E. 2d 733; Gottfried v. Gottfried, 1st Dept. 1945, 269 App. Div. 413, 56 N. Y. S. 2d 50.

The claim with respect to Browne-Vintners Old arose on December 20, 1940 when Browne-Vintners Old was sold to Distillers-Seagrams for $7,500,000. The statute runs from that date and not from the date or dates when Reinfeld, allegedly as a part of the conspiracy, received the Cointreau, Piper Heidsieck and Remy Martin agencies through his controlled company, Renfield Importers, Ltd., or when he received any other alleged secret emolument.

The evidence regarding the transfer of the three liquor agencies was relevant on the theory that if those agencies were later transferred directly or indirectly by the Bronfmans to a Reinfeld company for no consideration that fact could be considered by the jury on the question of whether Reinfeld had caused Browne-Vintners Old to be transferred to the Bronfmans for an inadequate consideration because of a secret side agreement that he would later be given these three agencies, or any of them. Thus what happened to the agencies after 1940 merely related to and bore on the purpose and nature of the 1940 transaction. It was the 1940 transaction which damaged the corporation and Rutkin to the extent that Rutkin had any interest in that corporation, not the later actions of the Bronfmans or anyone acting at their behest in causing the transfer of the agen-

cies to Reinfeld's company or in facilitating their acquisition.

[6] In any event the claim regarding Browne-Vintners Old was not asserted until the supplemental complaint was filed on November 13, 1951. The claim cannot be dated back to July 1, 1948 when the complaint was filed. Harriss v. Tams, 1932, 258 N.Y. 229, 240-245, 179 N.E. 476. Thus under the applicable New York law the claims arising from the sale of Browne-Vintners would have had to arise from acts which took place not later than November 13, 1945 in order to survive the bar of the statute. However, on any possible theory, including the one which we reject, the last act of claimed damage took place in August 1945, when the Piper Heidsieck agency was acquired by Renfield Importers, Ltd. Thus the Browne-Vintners claim was barred by the New York statute.

We now turn to the assertion of the defendants that both the L. L. & B. and the Browne-Vintners Old claims are unenforceable for illegality.

Unenforceability because of illegality

a. The L. L. & B. Transaction, 1931

In the course of the plaintiff's case there was considerable testimony regarding his relationships with Reinfeld and various other partners in a bootlegging syndicate which operated from about 1927 until the repeal of the Prohibition Amendment on December 7, 1933, and after repeal in Browne-Vintners Old. Much of this was repetitious of what was before the Supreme Court in Rutkin v. United States, supra, wherein Mr. Justice Burton summarized the evidence at pages 132 to 134 of 343 U. S., 72 S. Ct. 571, 96 L. Ed. 833. Indeed considerable of the evidence given before the New Jersey jury which convicted

Rutkin was read to the petit jury herein or was used to refresh and cross examine witnesses including Rutkin himself.

As bearing on the illegality of the L. L. & B. transaction the plaintiff's case established the following:

Sometime in 1927 Rutkin, who had been in the liquor business during prohibition, became a 6% partner of a large bootlegging syndicate of which Reinfeld was the general manager with headquarters in Newark, New Jersey. Rutkin testified "We purchased whiskey in Montreal, the boats picked it up in St. Pierre-Miquelon, and we brought it in and distributed it." The partnership picked it up in its own boats registered in the name of a Nova Scotia company; it owned trucks, boats and barges. The liquor was unloaded at different places in New Jersey and New York and sold in the United States. In bad weather it was unloaded offshore into smaller boats and brought to the dock. Shipments ran from 5,000 to 30,000 cases. For the whiskey that was imported millions of dollars were wired to Canada. About 1928 the Rutkin-Reinfeld group was joined by another large bootlegging group "in order not to conflict with each other and have the market not go too haywire and to stabilize the market."

Early in 1931 one Marco Leon of Montreal talked to Rutkin and Reinfeld in Montreal suggesting that they acquire the L. L. & B. distillery located at Chatham in Ontario, then in financial difficulties although almost ready to operate. Leon told them "in very short order it could be straightened out to operate." Rutkin said to Reinfeld "Joe, this is just what we want. We can operate this plant. The whiskey business does not employ many people —distilling whiskey doesn't—and whatever whiskey we don't send to St. Pierre ourselves, we have friends who will buy from us, and this deal is very, very good. We must not let it get away." Reinfeld agreed with this. At that time the price of whiskey was kept up by a pool of the five

principal Canadian distillers, the Bronfmans being one of the five. The evidence showed that whiskey could be produced in about six months; thus the Rutkin-Reinfeld group would have had a sure and cheaper source of supply—by way of St. Pierre.

Rutkin thought in terms of selling the whiskey within six months to a year. Thus he testified:

> "Q. About how long would it take to turn out whiskey for your, shall I say, partnership trade in 1931? A. For the trade?
>
> "Q. Yes. A. I can't answer that unless you let me quote Joe Reinfeld.
>
> "Q. No. I want your testimony as to what you think about it. A. What I should think about it? Six months.
>
> "Q. Six months. Because you were only getting whiskey sometimes that was only six months to a year old, is that right? A. Correct."

Upon his return to New Jersey Reinfeld arranged to have four or five experienced distilling men go up to Canada to run the plant. Rutkin and Reinfeld themselves visited the plant. Reinfeld promptly sent his lawyer, David Popik, to Canada to handle the necessary financial transactions. In acquiring the stock and the mortgages Popik used either the names of dummies or his own name rather than the names of Rutkin and Reinfeld or any of their associates although the moneys which he advanced were sent to him by the treasurer of the bootlegging partnership, Kanengeiser. Thus $29,660.75 for the first mortgage was money of the partnership given to Popik by Kanengeiser.

A few weeks after their Montreal visit Rutkin asked Reinfeld: "Joe, how is the plant? What type of whiskey comes out? Is it light, heavy, or what?" Whereupon

Reinfeld told Rutkin that he had agreed to turn the distillery over to Bronfman for what it had cost them.

The trial court in ruling against the defendants' contentions on this point stated that in view of the repeal of the Eighteenth Amendment in 1933 "the triers of the fact may have found that acquisition of the Canadian distillery was with a view to sell its products in the United States after repeal". This argument loses some of its force when we note that the joint resolution in Congress which ultimately became the 21st Amendment was not introduced until February 20, 1933. A prior resolution was introduced and defeated on December 5, 1932. Although there was agitation for the repeal of the 18th Amendment almost from the time it was adopted, there is no reason to believe that repeal was sufficiently predictable early in 1931 to warrant assuming its occurrence in embarking on a business venture.

At the very least on this record this question should have been left to the jury as were the questions regarding limitations. Not only did the trial judge not leave this question to the jury specially as had been requested by counsel, but there was no instruction whatsoever on the question of illegality despite appropriate requests to charge.

The Reinfeld defendants' amended request number 8 read: "I charge you that if you find the so-called 'High Seas' partnership was in fact engaged in bringing intoxicating liquors into the United States for sale in violation of the National Prohibition Act [41 Stat. 305]; and if you further find that the L. L. & B. distillery and company were to be acquired, if at all, for [the use of] that partnership, then you may not award any damages to plaintiff in respect of the L. L. & B. transaction". Request number 19 for the Bronfman defendants was to the same general effect. Both requests were denied.

[7] In any event the evidence here is so clear and convincing that in 1931 Rutkin and Reinfeld intended the L. L. & B. distillery operation to be a part of their business of illegally importing liquor into the United States that the trial judge should have dismissed that part of the case having to do with the L. L. & B. transaction. Even Rutkin never testified that the partnership did not intend to import L. L. & B. whiskey until after repeal; on the contrary all his testimony makes it clear that they were interested in a quick and cheap source of supply in 1931. While repeal was then a remote possibility, the higher prices resulting from the Canadian pool operation was a present competitive fact. While the trial judge argued in his opinion that minimum standards of potability for the whiskey would support a finding (which was never made) that what was planned in 1931 was not meant to take effect until after repeal in 1933, this is pure speculation and is certainly contrary to the experience of a large part of the long suffering American liquor consuming public at the time. There is no evidence that the Rutkin-Reinfeld bootlegging operation cared anything about the potability of the product which they were selling illegally on an enormous scale and at large profits.

[8, 9] The trial judge further argued that since the L. L. & B. transaction took place in Canada the prohibition laws of the United States did not render it illegal. But it now seems well settled that if a contract is entered into with a view of violating the laws of another country it is unenforceable even though it does not otherwise contravene the law of the place where it is made or of the forum. 6 Williston on Contracts, § 1749 (rev. ed. 1938); Restatement of Contracts, § 592; Graves v. Johnson, 1892, 156 Mass. 211, 30 N.E. 818, 15 L.R.A. 834, Holmes J. This appears to be the law of Canada as well. Walkerville Brewing Co. v. Mayrand [1928], 4 Dom.L.R. 500, noted in

42 Harv.L.Rev. 436. (This case was reversed on appeal [1929], 2 Dom.L.R. 945, but the reversal was on the ground that the lower court should not have taken judicial notice of the law of the United States.) Rutkin was clearly aware of the illegal purpose of the L. L. & B. transaction and was in fact, a member of a conspiracy bent on effecting that purpose. He is therefore in no position to assert rights based upon the L. L. & B. contract. Moreover, any rights which Rutkin may have in the L. L. & B. transaction are derived through a bootlegging partnership which was itself illegal. This partnership carried on its liquor business in the United States, and was therefore clearly governed by the prohibition laws of the United States. A member of such an illegal partnership is not entitled to enforcement of any right depending on the partnership agreement. McMullen v. Hoffman, 1899, 174 U. S. 639, 19 S. Ct. 839, 43 L. Ed. 1117; Rosenblum v. Frankel, 1st Dept. 1951, 279 App. Div. 66, 108 N. Y. S. 2d 6; Parise v. Pepe, 2nd Dept. 1951, 270 App. Div. 769, 59 N. Y. S. 2d 497; O'Connor v. O'Connor, 2nd Dept. 1941, 263 App. Div. 820, 31 N. Y. S. 2d 372. McMullen v. Hoffman is cited with approval in Bruces Juices v. American Can Co., 1946, 330 U. S. 743, 756 note, 67 S. Ct. 1015, 91 L. Ed. 1219.

[10, 11] The L. L. & B. transaction having been spawned in illegality, the later repeal of the Eighteenth Amendment in December 1933 did not open the doors of the courts to the plaintiff. Fitzsimons v. Eagle Brewing Co., 3 Cir., 1939, 107 F. 2d 712, 126 A.L.R. 681. The law of New York now seems to be clearly settled that without some plain indication of a contrary legislative intent the repeal of a statute does not validate contracts previously illegal under it. Toll v. Friedman, 1st Dept. 1947, 272 App. Div. 587, 74 N. Y. S. 2d 176; Dunmar Robes Ltd. v.

Buenaventura, 1st Dept. 1952, 279 App. Div. 286, 109 N. Y. S. 2d 699; Government of the French Republic v. Cabot, Sup. Ct. N. Y. County 1947, 190 Misc. 517, 76 N. Y. 2d 290.

b. Browne-Vintners Old

Two or three months before repeal in December 1933 Rutkin and Reinfeld and their bootlegging partners discussed conducting a liquor business after repeal. According to Rutkin, "Joe Reinfeld said 'we will form a company in New York City and a lot of us cannot go in and put money in under our own names * * * through being in the liquor business during Prohibition.' " Reinfeld said he would send some of the partnership money to one Bowers in Canada for investment through Bowers in the new company. Maybe three or four hundred thousand dollars was thus sent to Canada. A New York corporation, Browne-Vintners Co., Inc. (Browne-Vintners Old) was formed and a druggist named Browne was put in as nominal president. Rutkin testified that subsequently Browne-Vintners Old obtained a New York State liquor license. Rutkin claimed he had an interest in the company from the beginning which interest did not appear on the books but was held for him by Reinfeld. Rutkin testified that the reason he was not carried as a stockholder was "because I was in the bootlegging business." Others of the old bootlegging partners also had interests in Browne-Vintners Old which were not disclosed in the license application filed November 16, 1933, among them Abner Zwillman, Joseph Stacher, Joseph and Harry Davis and Reinfeld. Although Reinfeld's interest was later disclosed in a 1940 application, Rutkin's interest was never disclosed to the New York authorities.

Appendix A.

The questions in the New York State application for corporate liquor businesses were obviously designed to discover all persons having an interest in the business regardless of whether they were stockholders of record; this was pursuant to the provisions of the Alcoholic Beverage Control Law, Mc. K. Consol. Laws, c. 3—B, § 110. Thus question 13 required all applicants to "state the name and residence of each person interested, or to become interested, in the traffic of liquor for which the application is made, together with the nature of such interest," and question 14 asked for information regarding any associates or partners.

[12] Here Rutkin relied on his undisclosed interest, which was illegally concealed from the New York State authorities, to support his claim that he was defrauded when the Browne-Vintners Old assets were sold. Having failed to disclose his interest as the law requires, he may not now assert that interest in a court of law. In the leading New York case of Flegenheimer v. Brogan, 1940, 284 N. Y. 268, 30 N. E. 2d 591, 132 A. L. R. 613, the widow of Flegenheimer, better known as "Dutch Schultz," was debarred from invoking the aid of the court with respect to her husband's interest in a liquor corporation, which interest had not been disclosed in accordance with the provisions of the Alcoholic Beverage Control Act. The Court of Appeals in sustaining the defense of illegality wrote at pages 272 and 273 of 284 N. Y. at page 592 of 30 N. E. 2d: "In effect, then, this action is one brought by an alleged secret owner to vindicate his assertion of beneficial title to property he had parted with in order to perpetrate a fraud upon the statute which regulates and controls traffic in alcoholic beverages. * * * The transactions of plaintiff's intestate were clearly destructive of the purpose of a statute which was enacted 'for the pro-

tection, health, welfare and safety of the people of the state.' Alcoholic Beverage Control Law, § 2. We think those transactions were so far against the public good as to disable the plaintiff from invoking the aid of the court in her endeavor to disengage herself (as administratrix) from the unlawfulness of the conduct of her intestate." O'Connor v. O'Connor, supra; Romano v. Bono, Sup. Ct. Kings Co., 1938, 168 Misc. 897, 6 N. Y. S. 2d 204; Rosenblum v. Frankel, supra; and Parise v. Pepe, supra, are to the same effect.

The trial judge attempted to distinguish the Flegenheimer case on the ground that here Rutkin did not himself perpetrate the concealment. This view completely disregards Rutkin's sworn testimony that it was understood by him, by Reinfeld and by the other partners at the 1933 meeting that his interest, and other interests as well, would not be disclosed. Since he participated in the illegality, his claim is clearly unenforceable under the rule of the Flegenheimer case.

Thus as the acts which caused the alleged damages to the plaintiff all flowed from illegal transactions—the L. L. & B. transaction and the plaintiff's interest in Browne-Vintners Old—the trial judge should have granted the defendants' motion to dismiss the case.

The defendants also urge additional errors: that there was no substantial evidence to establish the alleged conspiracy, that recovery on the Browne-Vintners Old claim is barred by an assignment, that recovery is completely barred by a general release of May 11, 1943, and, as to Reinfeld, that he was entitled to a credit of $250,000 which he had paid Rutkin for the general release. As the two grounds which we have considered each disposes of the case, it is unnecessary to deal with these other items of alleged error.

The judgment is reversed and the complaints are dismissed.

APPENDIX B.

SUPREME COURT OF THE UNITED STATES

No....., October Term, 1955.

JAMES RUTKIN,

Petitioner,

v.

JOSEPH REINFELD, SAMUEL BRONFMAN and ALLEN BRONFMAN, individually and as co-partners doing business under the style and name of BRONFMAN INTERESTS and BROWNE-VINTNERS CO., INC., etc.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 21st, 1956.

(SGD) JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States.

Dated this 20th day of April 1956.

APPENDIX C.

Statutory Provisions.

United States Constitution, Amendment XVIII—Liquor Prohibition.

1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is prohibited.

2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

United States Constitution, Amendment XXI—Repeal of Prohibition Amendment.

1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

(Ratified, December 5, 1933.)

Appendix C.

2. **New York Alcoholic Beverage Control Act—§ 110.**

"§ 110. Statements to be made in applications for licenses.

In addition to such other information as the liquor authority may determine shall be furnished in any application for a license under this chapter, the following information shall be given under oath:

1. The name, age and residence of each applicant and, if there be more than one and they be partners, the partnership name and the age and residence of the several persons so applying, and the facts as to his or their citizenship;

2. The name and residence of each person interested, or to become interested, in the business covered by the license for which the application is made, together with the nature of such interests; and if such applicant be a corporation, the application shall set forth the name of the corporation, the names of its directors or other governing body, the names of its officers and stockholders if it be a stock corporation, and the state under the laws of which it is organized;

3. The premises to be licensed stating the street and number, if the premises have a street and number, and otherwise such apt description as will reasonably indicate the locality thereof. The applicant shall also state the nature of his interest in the premises; and the name of any other person, either as principal or associate, interested with the applicant either in the premises or in the business to be licensed;

4. A statement that such applicant has not been convicted of a felony; and has not had a license issued to him under chapter one hundred and eighty of the laws

of nineteen hundred thirty-three or this chapter revoked for cause within two years prior to the date of such application;

If there be any change, after the granting of a license, in any of the facts required to be set forth in such application, a supplemental statement giving notice of such change, duly verified, shall be filed with the liquor authority or appropriate board, as the case may be, within ten days after such change. Failure to do so shall, if wilful and deliberate, be cause for revocation of the license. In giving any notice, or taking any action in reference to a licensee of licensed premises, the liquor authority or the appropriate board, as the case may be, may rely upon the information furnished in such application and in any supplemental statement connected therewith, and such information may be presumed to be correct, and shall be binding upon a licensee or licensed premises as if correct. All information required to be furnished in such application or supplemental statements shall be deemed material in any prosecution for perjury."

New York Civil Practice Act § 11.

"§ 11. Mode of computing periods of limitation. The periods of limitation prescribed by this article, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff or a defendant in the particular action or special proceeding.

Where the action is brought for breach of a covenant of seizin or against incumbrances, the cause of action, for the purposes of this section only, is deemed to have accrued upon an eviction, and not before."

Appendix C.

New York Civil Practice Act § 13.

"§ 13. Limitation where cause of action arises outside of the state. Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. Where such cause of action, whether originally accrued in favor of a resident or non-resident, arose in a foreign country with which the United States or any of its allies was then or subsequently at war, or in territory then or subsequently occupied by the government of such foreign country, the period between the commencement of the war, or the occupation of such country, and the termination of hostilities with such country, or the termination of such occupation, is not a part of the time limited in this article for commencing the action; provided, however, that nothing herein or in this article shall apply to or be deemed in any manner to affect any action under section six hundred twenty-five of the banking law against a banking organization or against the superintendent of banks."

New York Civil Practice Act § 48.

"§ 48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

"(5.) An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by

the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

"(8.) An action, legal or equitable, by or on behalf of a corporation against a director, officer or stockholder, or a former director, officer or stockholder, if such action is for an accounting, or to procure judgment on the ground of fraud, or to recover a penalty or forfeiture imposed or to enforce a liability created by common law or by statute unless such action is one to recover damages for waste or for an injury to property or for an accounting in connection therewith in which case such action shall be subject to the provisions of subdivision seven of section forty-nine."

New York Civil Practice Act § 49.

Actions to be commenced within three years. The following actions must be commenced within three years after the cause of action has accrued:

7. An action to recover damages for an injury to property, except in the case where a different period is expressly prescribed in this article.

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Supreme Court of the United States

OCTOBER TERM—1956

Docket No. .....

ARTHUR KAPLOW as executor of the estate of ABRAHAM RUTKIN deceased, herein formerly named as James Rutkin,

Petitioner and Appellee,

—against—

JOSEPH REINFELD, SAMUEL BRONFMAN and ALLEN BRONFMAN, individually, and as co-partners doing business under the style and name of BRONFMAN INTERESTS and BROWNE-VINTNERS CO. INC., RENFIELD IMPORTERS, LTD., and HAROLD C. (SONNY) LEVIN, also known as HAROLD C. RENFIELD,

Respondents and Appellants.

BRIEF OF RESPONDENTS JOSEPH REINFELD, RENFIELD IMPORTERS, LTD. AND HAROLD C. LEVIN (RENFIELD) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The petitioner's decedent (the plaintiff) invoked jurisdiction of the District Court solely because of diversity of citizenship (R 13, 25-26). Plaintiff had judgment on a jury verdict which found, according to allegations of the original and supplemental complaints, that respondents had conspired to defraud the plaintiff in respect of two transactions referred to as (a) The L. L. & B. Claim and

(b) The Browne-Vintners Old Claim (R 13-19, 25-32, 2560-62).

The L. L. & B. Claim was made in the original complaint filed July 1, 1948 (R 1). It alleged in substance: Plaintiff and respondent Joseph Reinfeld were partners; after Reinfeld had successfully negotiated an agreement on behalf of the partnership on July 2, 1931 for the acquisition of a small distillery in Ontario, Canada, known as the L. L. & B. distillery, which had just about been completed and never operated, he conspired with respondents Samuel and Allen Bronfman to deprive the plaintiff of his interest in this partnership asset by permitting the Bronfmans to acquire title to the distillery in return for secret emoluments given him by them (R 13-19).

The Browne-Vintners Old Claim was made in the supplemental complaint filed November 13, 1951 (R 5). It alleged: Plaintiff and Reinfeld, as partners, owned stock interests held in the names of Reinfeld and other nominees in Browne-Vintners Co. Inc. (Browne-Vintners Old), a New York corporation engaged in the wholesale liquor business. In December 1940, pursuant to the original 1931 conspiracy, respondents agreed that Reinfeld would cause the business and assets of Browne-Vintners Old to be sold for an inadequate price to Distillers Corporation-Seagrams, Limited (Distillers-Seagrams). Among the assets thus sold were three agencies in the United States for Cointreau, Piper Heidsieck and Remy Martin. These agencies were later transferred in 1945 to respondent Renfield Importers, Ltd., which was controlled by Reinfeld and defendant Harold C. Levin (Renfield). The transfer, which plaintiff did not discover until 1948, was part of the consideration to Reinfeld for his part in the L. L. & B. transaction (R 25-32).

These claims were denied in their entirety, and on the appeal from the judgment it was urged on behalf of those

respondents whom we represent that the record was devoid of proof sufficient to establish any liability on the part of the respondents Renfield Importers, Ltd. and Harold C. Levin (Renfield); that there was no substantial evidence of the alleged conspiracy; and that defenses of general release, assignment, illegality and limitations should have precluded the judgment and warranted its reversal. The Court of Appeals reversed and dismissed the complaints upon the last two defenses, but did not deem it necessary to consider the others.

At the close of plaintiff's case respondents moved for dismissal of the complaints. At the end of the entire case they renewed their motions to dismiss and moved for a directed verdict. After the verdict respondents moved to set it aside and for judgment in accordance with their motions for a directed verdict (Fed. Rule Civ. Proc. 50). Decision of these motions was reserved, but they were all ultimately denied (R 2542-59). 122 F. Supp. 265.

The motions were based upon the grounds, among others, that both the L. L. & B. and Browne-Vintners Old Claims were unenforceable because of (1) limitations and (2) illegality (R 2549, 2554).

(1) As to Limitations

The trial judge submitted to the jury special questions bearing upon the defenses of limitations which the jury answered thus:

> The L. L. & B. Claim arose December 15, 1931. Plaintiff became aware of the claim in May 1946. Plaintiff should have become aware of the claim in the exercise of reasonable care between December 1931 and December 1932.
>
> The Browne-Vintners Old Claim arose December 20, 1940. Plaintiff did not become aware of the claim

until January 1948. Plaintiff should have become aware of the claim in the exercise of reasonable care some time in 1947 (R 2530-31).

Despite these findings of fact, the trial judge refused to sustain the defenses of limitations under the New York statutes, which, as he found and petitioner concedes, are applicable (Pet. 13). He said the complaint "alleged a single wrong of conspiracy" (R 2551); and applying the rule of criminal conspiracy, he held that the period of limitations did not begin to run until the last overt act in furtherance of the conspiracy (R 2553).

He decided further that the applicable New York statute was Civil Practice Act, § 48, subd. 5, governing cases of fraud and deceit, and that the six-year limitation there prescribed did not start to run until the Browne-Vintners Old transaction was either actually discovered (January 1948) or should have been discovered (1947). Therefore, the single conspiracy claim was not barred by lapse of time (R 2551-53).

The Court of Appeals took quite a different view (Pet. App. A, 21-37). 229 F. 2d 248. It did not, however, as petitioner erroneously states, reverse "the determination of the District Court jury" (Pet. 2). Rather, in sustaining the defenses of limitations, it accepted, as had the plaintiff and the respondents, the jury's answers to the special questions of the trial judge; but it held that, on the basis of those answers, both the L. L. & B. and the Browne-Vintners Old Claims were barred by the applicable New York Statutes of Limitations as construed by the Court of Appeals of the State of New York (Pet. App. A, 25-29).

The Court of Appeals held that "the damage for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific

overt acts," and that "the statute therefore begins to run at the moment such injury occurs" (Pet. App. A, 26). For this conclusion the court relied on *Lewis Invisible Stitch Mach. Co.* v. *Columbia Blindstitch Mach. Mfg. Corp.*, 80 F. 2d 862, 864 (2nd Cir. 1936) in which Judge Learned Hand followed the leading New York case of *Green* v. *Davies*, 182 N. Y. 499, 504 (1905), which in turn was based on *Brackett* v. *Griswold*, 112 N. Y. 454, 466 (1889) holding: "The allegation that there was a conspiracy to commit the fraud does not effect the substantial ground of action. The *gravamen* is fraud and damage, and not the conspiracy."

Applying these well-settled principles, the Court of Appeals made the following dispositions:

As to the L. L. & B. Claim, the Court held that, even assuming the claim was really one for fraud and deceit and therefore limited by the New York six-year statute (Civil Practice Act, § 48, subd. 5), the period of limitations began at the latest in December 1932 when, as the jury found, the plaintiff should have become aware of the claim in the exercise of reasonable care; citing *Higgins* v. *Crouse*, 147 N. Y. 411, 416 (1895).* Hence, the plaintiff was barred from recovery on the L. L. & B. transaction long before the original complaint was filed on July 1, 1948 (Pet. App. A, 26-27).

As to the Browne-Vintners Old Claim, the Court held that, assuming the sale was for an inadequate consideration and induced by the later transfer of the three liquor agencies, the alleged wrong was not to the plaintiff personally, but to the New York corporation, Browne-Vintners Old. Any claim for that wrong therefore belonged to the corporation and was enforceable by it or on its behalf. As

* This case had been recognized by the trial judge as representing the New York law in *Warner* v. *Republic Steel Corp.*, 103 F. Supp. 998, 1009 (S. D. N. Y. 1952).

such, the claim was governed by New York Civil Practice Act, § 48, subd. 8 which requires that suit be commenced within six years from the date when the claim accrued, i.e., from the date of the wrong regardless of the date of its discovery by the plaintiff; citing *Hastings* v. *H. M. Byllesby & Co.*, 293 N. Y. 404, 411-412 (1944), cert. denied *sub nom. Hastings* v. *Haystone Securities Corp.*, 324 U. S. 860 (1945); *Gottfried* v. *Gottfried*, 269 App. Div. 413 (1st Dept. 1945); *Zwerdling* v. *Bent*, 291 N. Y. 654 (1943). The claim having arisen, as the jury found, on December 20, 1940 when Browne-Vintners Old was sold to Distillers-Seagrams, the statute ran from that date and not from the time when Reinfeld allegedly received secret emoluments pursuant to the alleged conspiracy. Even so, the last act of claimed damage took place in August 1945 when the Piper Heidsieck agency was acquired by Renfield Importers, Ltd. Since the Browne-Vintners Old Claim was not sued upon until the supplemental complaint was filed November 13, 1951, it was by then barred by the six-year limitation of Civil Practice Act, § 48, subd. 8 (Pet. App. A, 27-29).

(2) As to Illegality

At the trial plaintiff adduced evidence as part of his own case that at the time of the L. L. & B. transaction plaintiff and Reinfeld, with others, were members of a bootlegging "partnership" or syndicate engaged in the importation of whiskey into the United States in violation of the National Prohibition Law (R 53-58, 245, 280-83, 305).* This admittedly was the partnership which was to acquire the L. L. & B. distillery (Pet. 16).

---

* The evidence was substantially the same as that in *Rutkin* v. *United States*, 343 U. S. 130 (1951) summarized at 132-134 (Pet. App. A, 29).

The District Judge did not submit the question of illegality to the jury (R 2489-90, 2494; Pet. App. A, 32). Nevertheless, he held that on the evidence "the triers of the fact may have found that acquisition of the Canadian distillery was with a view to sell its products in the United States after repeal" (R 2555).

The Court of Appeals held, on the very proof adduced at the trial by the plaintiff himself, that "the evidence here is so clear and convincing that in 1931 Rutkin and Reinfeld intended the L. L. & B. distillery operation to be a part of their business of illegally importing liquor into the United States that the trial judge should have dismissed that part of the case having to do with the L. L. & B. transaction" (Pet. App. A, 33). Plaintiff, said the Court, having been a member of a criminal partnership bent on effecting the illegal purpose of the L. L. & B. transaction, was not entitled to enforcement of any rights based on the L. L. & B. contract and depending on the illegal partnership agreement; citing *McMullen* v. *Hoffman*, 174 U. S. 639 (1899), cited with approval in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 756, n. 4 (1946); *Rosenblum* v. *Frankel*, 279 App. Div. 66 (1st Dept. 1951); *Parise* v. *Pepe*, 270 App. Div. 769 (2d Dept. 1951); *O'Connor* v. *O'Connor*, 263 App. Div. 820 (2d Dept. 1941). In so holding, the Court of Appeals rejected, as contrary to New York law, plaintiff's contention that later repeal of the Eighteenth Amendment served to validate the illegal L. L. & B. transaction; citing *Toll* v. *Friedman*, 272 App. Div. 587 (1st Dept. 1947); *Dunmar Robes, Ltd.* v. *Buenaventura*, 279 App. Div. 286 (1st Dept. 1952); *Government of the French Republic* v. *Cabot*, 190 Misc. 517 (Sup. Ct. N. Y. Co. 1947) (Pet. App. A, 33-35).

At the trial it also developed as part of plaintiff's case that his alleged stock interest in Browne-Vintners Old

did not appear on the corporate books because, as he testified, "I was in the bootlegging business" (R 295-96). For this very reason, with plaintiff's full knowledge and consent, his interest was not disclosed to the New York State liquor authorities when Browne-Vintners Old applied for a liquor license (R 76-79, 216). The disclosure was not made despite the fact that both the New York Alcoholic Beverage Control Law, § 110 and the license application made pursuant thereto required all applicants to "state the name and residence of each person interested, or to become interested, in the traffic of liquor for which the application is made, together with the nature of such interest" (Exh. 8, R 2596).

The District Court nevertheless held that "plaintiff's claim for fraud in the sale of the corporation cannot be fairly characterized as an integral part of the violation"; and added, "[i]n any event, it was not plaintiff, but some of the defendants in control who omitted any disclosure required to be made, and this circumstance significantly distinguishes situations where the claimant himself perpetrated the concealment" (R 2556).

But the Court of Appeals considered that "[t]his view completely disregards Rutkin's sworn testimony that it was understood by him, by Reinfeld and by the other partners at the 1933 meeting that his interest, and other interests as well, would not be disclosed. Since he participated in the illegality his claim is clearly unenforceable under the rule of the *Flegenheimer* case" (Pet. App. A, 37).

Therefore, said the Court of Appeals, plaintiff "[h]aving failed to disclose his interest as the law requires, he may not now assert that interest in a court of law" (Pet. App. A, 36). For this it relied on the leading New York case of *Flegenheimer* v. *Brogan*, 284 N. Y. 268 (1940), 132 A. L. R. 613, and the decisions of lower New York courts in *O'Connor*

v. *O'Connor*, *Rosenblum* v. *Frankel* and *Parise* v. *Pepe*, all above; and *Romano* v. *Bono*, 168 Misc. 897 (Sup. Ct. Kings Co. 1938).

The trial judge having reserved decision on respondents' motions for dismissal, to set aside the verdict and for a directed verdict, and the Court of Appeals having found that the evidence presented no determinative fact questions for the jury and that principles of New York law were dispositive of the entire case, it was not required, as petitioner contends (Pet. 3),* to remand the case to the District Court for a new trial and it appropriately directed dismissal of the complaints. Fed. Rule Civ. Proc. 50(b); *Baltimore & Carolina Line Inc.* v. *Redman*, 295 U. S. 654 (1935).

Reasons for Denial of the Writ

As the foregoing Statement of the Case shows and as the very questions posited by the petition demonstrate (Pet. 3), this suit involves necessarily and exclusively the proper interpretation and application of New York law, statutory and common, in a purely private controversy not affected with a public interest. As such, it is not a proper case for certiorari.

Argument

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Supreme Court Rule 19. The Rule embodies the criteria by which the Court determines whether a particular case merits consideration, with due regard to the proper func-

* Although petitioner states this as one of the "questions presented" and as one of the "reasons for the allowance of the writ" (Pet. 3, 9), the petition does not argue the point.

tioning of the limited reviewing powers to which this Court is confined. *Rice* v. *Sioux City Memorial Park Cemetery, Inc. et al.*, 349 U. S. 70, 73-74 (1955).

In considering the defenses of limitations and illegality in the case at bar the lower courts were, as petitioner concedes (Pet. 13), required to apply New York law as declared in statutes of the State and decisions of its highest court. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938); *Klaxon Company* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487 (1941); *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945). Hence, the only criterion of Rule 19 possibly applicable here is the one which declares that certiorari may be granted "where a court of appeals has decided an important state * * * question in a way in conflict with applicable state * * * law." Rule 19, subd. 1(b). But the instant case clearly does not fall within this category.

First. However important the case may be to the petitioner, the questions decided are not "of such gravity and general importance as to require the review of the conclusions of the * * * Court of Appeals in reference to them." *In re Woods, Petitioner*, 143 U. S. 202, 206 (1892); *Fields* v. *United States*, 205 U. S. 292, 296 (1907). They are not "questions of importance which it is in the public interest to have decided by this Court of last resort." *Magnum Import Company, Inc.* v. *Coty*, 262 U. S. 159, 163 (1923).

Second. There has been an utter failure to overcome the presumption that the Court of Appeals did *not* decide the questions involved "in a way in conflict with applicable state law." Rule 19, *supra*. This Court has said: "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and do not review, save in exceptional cases the

considered determination of questions of state law by the intermediate federal appellate courts * * *." *Huddleston et al.* v. *Dwyer, et al.*, 322 U. S. 232, 237 (1944). And again: "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error." *Palmer et al.* v. *Hoffman*, 318 U. S. 109, 118 (1943), rehearing denied, 318 U. S. 800 (1943). This judicial policy was applied in a case involving questions of state law identical with those presented here, i.e., (a) limitations and (b) illegality, in which this Court refused to disturb "the interpretation placed upon purely local [Texas] law by a Texas federal judge in answering these questions." *Steele* v. *General Mills, Inc.*, 329 U. S. 433, 438-439 (1947), rehearing denied, 329 U. S. 834 (1947).

Third. Actually, the questions involved were not decided by the Court of Appeals in a way in conflict with applicable state law. Rather, they were determined in conformity with that law. (See discussion *supra*, pp. 4-6.)

(1) As to Limitations

Petitioner has not presented one case in any jurisdiction holding, as he contends, that in a civil suit for conspiracy the applicable statute of limitations does not begin to run until the date of the last overt act in furtherance of the conspiracy (Pet. 10-15). He cites only cases of criminal conspiracy and ignores, as did the District Court, the "important distinction," recognized by the Court of Appeals, "between the rule applicable in civil and that applicable in criminal cases" (Pet. App. A, 26). As we have seen, in so holding the Court of Appeals applied the settled law of New York as enunciated in *Green* v. *Davies*, 182 N. Y. 499, 504 (1905), which petitioner recognizes as authoritative (Pet. 11). Petitioner also defers, as he must, to *Nalle* v. *Oyster*, 230 U. S. 165, 182 (1913) and *Lewis Invisible*

Stitch Mach. Co. v. *Columbia Blindstitch Mach. Mfg. Corp.*, 80 F. 2d 862, 864 (2nd Cir. 1936), both relied on by the Court of Appeals; but he makes an ineffectual effort to distinguish them from the case at bar (Pet. 11-12).

The cases cited by petitioner in this connection do contain language which, superficially read, might indicate that there is "a cause of action for conspiracy," as such. *Duane Jones Company, Inc.* v. *Burke*, 306 N. Y. 172, 190 (1954) quoting from *Kveiczky* v. *Lorber*, 290 N. Y. 297, 306 (1943). But in both cases the actionable wrong was in reality an unlawful injury to plaintiff's business, although inflicted as the result of concerted action by the defendants. In those cases the courts were neither called upon to sustain the sufficiency of a civil conspiracy as a separate cause of action, nor to consider the bar of the statute of limitations. And even were we to concede, for argument's sake, the existence of "a cause of action for conspiracy," that would not alter the settled law as stated in *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464, 469 (3rd Cir. 1950):

> "In a civil conspiracy suit each invasion of plaintiff's interest resulting from the conspiracy creates a new cause of action *when the question is the application of the bar of the statute of limitations.*" (Emphasis ours.)

Here, therefore, there were in reality two separate and distinct causes of action made the bases of suit—the L. L. & B. Claim and Browne-Vintners Old Claim.

Even reading the L. L. & B. Claim as one for fraud and deceit and hence governed by the New York six-year statute (C. P. A. § 48, subd. 5), the period of limitations began to run from the time when the plaintiff, in the exercise of reasonable diligence, should have discovered the fraud. *Higgins* v. *Crouse*, 147 N. Y. 411, 416 (1895). Petitioner

does not contend that the applicable New York law is otherwise; but now for the first time he quarrels with the jury's finding that plaintiff should have discovered the claim between December 1931 and December 1932. Petitioner argues that the "testimony" showed a partnership or fiduciary relationship between plaintiff and Reinfeld and that "clews, [sic] which would cause persons dealing at arm's length to promptly make inquiry, would not serve to put a person dealing with another in a fiduciary capacity on guard" (Pet. 14). Assuming this jury question were still an open one, it is purely a question of fact peculiar to this case which the Court will not review by certiorari. See Justice Roberts' dissent in *Deputy et al.* v. *du Pont*, 308 U. S. 488, 500-501 (1940).* Of course, as plaintiff's own testimony shows, he became fully aware of the L. L. & B. Claim almost as soon as it first arose (R 74-76, 286-288).

The Circuit Court's holdings that the Browne-Vintners Old Claim belonged to the corporation; was enforceable only by the corporation itself or a stockholder suing on its behalf; was governed therefore by the six-year statute (Civil Practice Act, § 48, subd. 8); and accrued from the date of the wrong, regardless of the date of its discovery—all are based upon unimpeachable New York authority which petitioner does not even attempt to question (Pet. 14-15). The jury having found that the Browne-Vintners Old Claim accrued December 20, 1940, the claim was clearly barred by the six-year limitation when it was first asserted in the supplemental complaint filed November 13, 1951. This is so even though the claim be regarded as having accrued when the last alleged secret emolument was received in August 1945 (Pet. App. A, 27-29).

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* Described as "one of the most explicit statements of the function of certiorari which has appeared in the reports." 53 Harvard Law Rev. 579, 590-591, n. 22.

Petitioner's quarrel with this holding appears to be that "it completely casts aside the evidence of the intent of the partners and runs away from the plain facts of the case" (Pet. 15). But this is just another attempt to obtain review by this Court of evidentiary facts peculiar to the case at bar—an effort which must meet with failure. See letter of Chief Justice Hughes to Senator Wheeler reprinted in Sen. Rep. No. 711, 75th Cong., 1st Sess. (June 14, 1937) 38, 39.

(2) As to Illegality

The illegality of the alleged "liquor partnership" is not contested by petitioner. And he concedes that the L. L. & B. distillery was to be acquired, if at all, by and for the use of that partnership (Pet. 16).

In attempting to overcome the defense of illegality, however, plaintiff contended in the District Court that the product of the distillery was not to be used within the United States until after repeal of the National Prohibition Act. But, as the Court of Appeals held, "the evidence here is so clear and convincing that in 1931 Rutkin and Reinfeld intended the L. L. & B. distillery operation to be a part of their business of illegally importing liquor into the United States that the trial judge should have dismissed that part of the case having to do with the L. L. & B. transaction" (Pet. App. A, 33). And this holding, it should be noted, is based exclusively on the proof made *by the plaintiff* at the trial (R 55-56, 68, 71-77, 175-176, 287, 289-290, 649, 688-693, 944-945).

The petitioner claims that this determination is erroneous because, so he argues, "[t]he evidence did not indicate an illegal act in the planned acquisition of the L. L. & B. Distillery by the liquor partnership * * *." And he characterizes the finding of the Circuit Court that the distillery

was to be acquired for "immediate importation of liquor into the United States" as an "erroneous assumption" and "in utter disregard of other pertinent testimony" (Pet. 16).

Even were this position correct, still it does not thereby present a question meriting certiorari. For petitioner in effect is asking this Court to review the evidence and to arrive at a conclusion different from that of the Circuit Court—"a conclusion based solely upon the peculiar facts of this single case." This does not come within the function of this Court "to settle important principles of law." Roberts, *J.*, dissenting in *Deputy* v. *du Pont, supra,* at 500, 501.

There is, and indeed there can be, no quarrel with the principle of law, prevailing in New York and other jurisdictions and applied by the Court of Appeals, that the courts will not recognize an illegal transaction nor enforce "rights" depending upon illegal agreements (Pet. App. A, 34).

Appellants' position that the repeal of Prohibition erased the taint of illegality from the L. L. & B. transaction is contrary to New York law (Pet. App. A, 34-35).

The illegality of the Browne-Vintners Old Claim rests entirely upon the public policy of New York declared in its Alcoholic Beverage Control Law § 110, as construed and applied by its highest and lower courts (Pet. App. A, 36-37).

In this connection, petitioner cites here, as plaintiff did below, *Rosasco Creameries, Inc.* v. *Cohen,* 276 N. Y. 274 (1937), holding that a *milk dealer*, though not licensed as required by law, may nevertheless recover on a contract for the sale of milk, as authority for the contention that although plaintiff's interest in Browne-Vintners Old was deliberately and with his consent concealed from the New

York State Liquor Authority, that interest may nevertheless be made the basis of a recovery in the New York courts (Pet. 19). But the *Rosasco* case was distinguished in *Carmine* v. *Murphy*, 285 N. Y. 413, 416 (1941), which held that the State Legislature, in requiring *liquor dealers* to be licensed, intended that their failure to obtain a license should preclude them from recovery upon their contracts.

CONCLUSION

The foregoing review of the record and decisions below make peculiarly apposite, we think, the words of this Court in *Ruhlin et al.* v. *New York Life Insurance Co.*, 304 U. S. 202, 206 (1938):

> "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition."

The petition should be denied.

Respectfully submitted,

THEODORE KIENDL
Attorney for Respondents
Joseph Reinfeld, Renfield Importers, Ltd. and Harold C. Levin (Renfield)

DATED: New York, N. Y.
July 16, 1956

THEODORE KIENDL
WILLIAM R. MEAGHER
Of Counsel

No. 187

JUL 30 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

ARTHUR KAPLOW as executor of the estate of ABRAHAM RUTKIN deceased, herein formerly named as James Rutkin,

Petitioner,

—against—

JOSEPH REINFELD, SAMUEL BRONFMAN and ALLEN BRONFMAN, individually, and as co-partners doing business under the style and name of BRONFMAN INTERESTS and BROWNE-VINTNERS CO. INC., RENFIELD IMPORTERS, LTD., and HAROLD C. (SONNY) LEVIN, also known as HAROLD C. RENFIELD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, SAMUEL BRONFMAN, ALLEN BRONFMAN and BROWNE-VINTNERS CO., INC. IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

ARTHUR KAPLOW as executor of the estate of ABRAHAM RUTKIN deceased, herein formerly named as James Rutkin,
Petitioner,

—against—

JOSEPH REINFELD, SAMUEL BRONFMAN and ALLEN BRONFMAN, individually and as co-partners doing business under the style and name of BRONFMAN INTERESTS and BROWNE-VINTNERS CO. INC., RENFIELD IMPORTERS, LTD., and HAROLD C. (SONNY) LEVIN, also known as HAROLD C. RENFIELD,
Respondents.

No. 187

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, SAMUEL BRONFMAN, ALLEN BRONFMAN and BROWNE-VINTNERS CO., INC. IN OPPOSITION

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply the statute of limitations of the State of New York?

2. Did the Court of Appeals correctly hold that under New York law petitioner's claims were barred by illegality?

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STATEMENT

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals which dismissed the complaint and reversed a judgment in favor of petitioner's decedent (hereafter referred to as petitioner) because his two claims were barred by the applicable New York statute of limitations and because under New York law these two claims were unenforceable because of illegality.

During prohibition there was a bootlegging partnership in New Jersey of which petitioner was a member, which purchased liquor from outside the United States, principally in Canada, and brought it to this country for sale and distribution (R. 55-56). Respondent Reinfeld was described by petitioner as the general manager of this partnership (R. 56).

Respondents Samuel and Allen Bronfman, Canadian citizens and residents, were in 1931 officers of Distillers Corporation-Seagrams Limited, a Canadian holding company which had certain subsidiaries engaged in the distilling business in Canada (R. 921). Respondent Reinfeld was a customer of certain distributing companies in which the Bronfmans had an interest and which sold Seagram products; there was no other relationship or connection between the Bronfman respondents and the respondent Joseph Reinfeld.

In 1931 a pooling agreement was formed among Canadian distillers which substantially increased the price of Canadian liquor (R. 1210). Because of this price increase, Reinfeld and several of his bootlegging associates decided, for a small investment to take over the financially embarassed L.L.&B. Distillery, which was located in Canada, and negotiated for the acquisition of this distillery (R. 1211-1212).

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In the fall of 1931 Reinfeld learned that the pool was being terminated and asked Samuel Bronfman to take him "off the hook" and take over the L.L.&B. Distillery which Bronfman agreed to do and did because Reinfeld was a good customer (R. 945, 1034, 1219). Petitioner alleged that Reinfeld received secret emoluments for not acquiring the L.L.&B. Distillery and that this transaction in 1931 between Joseph Reinfeld and Samuel Bronfman was the first act of a fraudulent conspiracy. As a member of the bootlegging partnership which planned to acquire this distillery petitioner alleged he was damaged and sought $22,000,000 damages in a complaint served in 1948 (R. 19).

Upon the repeal of prohibition certain of the bootlegging partners invested partnership funds in a New York corporation which they formed to engage in a legitimate liquor distributing business. They called this corporation Browne-Vintners Co., Inc. (R. 1474), and kept secret the fact that it was they who owned it. Their stock was held by innocuous nominees (R. 76-80).

In December 1940 the assets of this corporation were sold to Distillers Corporation-Seagrams Limited (Pl. Ex. 3; R. 2574) for $7,500,000 in cash and the assumption of company liabilities of approximately $8,000,000 (R. 2440). Petitioner alleged that this was an inadequate price and as a stockholder (albeit a concealed one) he was proportionately injured. He alleged that this was the second act of the conspiracy which had defrauded him in 1931 and that it was part of the consideration for the L.L.&B. transaction. He served a supplemental complaint claiming damages of an additional $500,000 in 1951 (R. 25).

The issues were presented to a jury which awarded petitioner a verdict for $77,200 with interest and costs

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(R. 2560-62). The jury also found that the claim with reference to the L.L.&B. transaction arose on December 15, 1931 (R. 2531) and that petitioner should have become aware of this claim in the exercise of reasonable care between December 1931 and December 1932 (R. 2531). Although respondents requested such a charge the trial judge did not charge the jury with reference to illegality (R. 2489-90; 2494). The trial judge denied motions to dismiss which were made on several grounds including the ground that the claims were barred by the statute of limitations and by illegality (R. 2536, 2539). 122 F. Supp. 265.

REASONS FOR DENYING THE PETITION

The questions raised by the petition are narrow questions of New York law. Both questions were decided by the Court of Appeals in accordance with authoritative, unchallenged and long established decisions of the courts of New York State.

ARGUMENT

Petitioner has failed to establish that the decision of the Court of Appeals on an important state question is in conflict with state law, as is required by Supreme Court Rule 19, subd. 1(b). Petitioner makes no attempt to show that the questions of local law involved are of such importance as to require the review by this Court of the conclusions of the Court of Appeals. See *In Re Woods*, 143 U. S. 202, 206 (1892).

In the absence of a showing of plain error by the Court of Appeals (*Francis* v. *Southern Pacific Co.*, 333 U. S. 445 (1948)) this Court traditionally accepts "the deter-

mination of local law by the Court of Appeals" *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530 at p. 534 (1949); e.g.: "Since the federal judge making those findings is from the * * * * bar, we give special weight to his statement of what the * * * * law is." *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956); *MacGregor* v. *State Mutual Co.* 315 U. S. 280 (1942).

There is no basis for granting this petition to review the determination of the Court of Appeals since it correctly applied well established principles of New York law.*

I

THE COURT OF APPEALS CORRECTLY APPLIED THE NEW YORK STATUTE OF LIMITATIONS.

In the words of the Court of Appeals, petitioner has attempted "to make a shambles of the statute of limitations and pervert its salutary purpose to set stale claims at rest" by alleging that the two acts of which he complains were committed pursuant to a civil conspiracy and that the statute of limitations runs from the time the conspiracy has ended and not from the date of each injury (Petition Appendix A, p. 27). This is not the law of New York and never has been.

The New York Court of Appeals in *Brackett* v. *Griswold*, 112 N. Y. 454 (1889), held:

> "But a mere conspiracy to commit a fraud is never of itself a cause of action, * * *. In other words, the

*The Court of Appeals decision was written by the Hon. J. Edward Lumbard, United States Circuit Judge, a member of the bar of the State of New York, formerly a justice of the Supreme Court of the State of New York, and formerly the United States Attorney for the Southern District of New York.

> principles which govern an action for fraud and deceit are the same, whether the fraud is alleged to have originated in a conspiracy, or to have been solely committed by a defendant without aid or cooperation. * * *"

This rule is well established in New York. *Green* v. *Davies*, 182 N. Y. 499 (1905); *Werbelowsky* v. *Rosen*, 260 App. Div. 222 at p. 226 (2d Dep't 1940); *Purofied Down Products Corp.* v. *National Association*, 97 N. Y. S. 2d 683 at p. 684 (Sup. Ct. Kings Co. 1950). In fact it is a statement of the basic concept of civil conspiracy. *Nalle* v. *Oyster*, 230 U. S. 165, 182 (1913); *Lewis Invisible Stitch Mach. Co.* v. *Columbia Blindstitch Mach. Mfg. Corp.*, 80 F. 2d 862, 864 (2d Cir. 1936).

A natural consequence is that the statute of limitations begins to run from the date of each injury incurred pursuant to a civil conspiracy. In *Pollack* v. *Warner Bros. Pictures, Inc.*, 266 App. Div. 118, 120 (1st Dep't 1943), the plaintiff sued to recover on a cause of action which alleged that the directors and officers of the defendant corporation, pursuant to a conspiracy to that end, had failed to perform their duties and wasted corporate assets by committing five separate acts. The Court held that the statute ran "from the date of the commission of each separate wrongful act."

This is the prevailing rule in the United States: *Momand* v. *Universal Film Exchanges*, 172 F. 2d 37 (1st Cir. 1948), cert. denied 336 U. S. 967 (1949); *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F. 2d 569 (9th Cir. 1948), cert. denied 336 U. S. 924, 955 (1949); *Suckow Borax Mines Consolidated* v. *Borax Consolidated, Ltd.*, 185 F. 2d 196 (9th Cir. 1950); *Williamson* v. *Colum-*

bia Gas & Electric Corp., 186 F. 2d 464 at p. 469 (3d Cir. 1950); *Park-In Theatres, Inc.* v. *Paramount-Richards Theatres, Inc.*, 90 F. Supp. 727 at p. 729 (D. Del. 1950) aff'd 185 F. 2d 407 (3rd Cir. 1950), cert. denied 341 U. S. 950 (1951).

The Court of Appeals followed these authorities and applied the appropriate New York statutes of limitation to each of the two injuries. Since the first alleged injury occurred in 1931 and the jury specifically found that plaintiff should have become aware of it in December 1932, the Court of Appeals held that regardless of what New York statute of limitations applied, suit on this claim was barred "long before he brought the action in 1948" (Petition, Appendix A, p. 27).

The Court of Appeals held that petitioner's claim with reference to the sale of Browne-Vintners Co., Inc. for an inadequate consideration was a wrong suffered by that corporation and was an action "by or on behalf of a corporation against * * * a former director, officer or stockholder to procure judgment on the ground of fraud" and thus was barred by § 48(8) of the New York Civil Practice Act (Petition, Appendix A, p. 27).

Petitioner claims that the basic error of the Court of Appeals was its failure to recognize that there is a cause of action for civil conspiracy in New York and that § 53 of the New York Civil Practice Act sets forth the statute of limitations applicable to this cause of action. § 53 of the New York Civil Practice Act reads:

> "§ 53. *Limitation where none specially prescribed.* An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Petitioner does not cite one case in any jurisdiction which ever applied any such rule. In support of his contention he cites the same two New York cases he cited to the Court of Appeals: *Duane Jones Company, Inc.* v. *Burke*, 306 N. Y. 172, 117 N. E. 2d 237 (1954); *Kewiczky* v. *Lorber*, 290 N. Y. 297, 49 N. E. 2d 146 (1943) and, oddly enough since it holds specifically to the contrary, *Green* v. *Davies*, 182 N. Y. 499, 75 N. E. 536 (1905). In *Green* v. *Davies* the court followed and quoted *Brackett* v. *Griswold, supra*.

In both the *Duane Jones* and the *Kewiczky* cases the wrong sued upon was not the conspiracy but the tortious act performed by the conspirators. Neither case involved the application of the statute of limitations. In the *Duane Jones* case the defendants, who were former employees of plaintiff, left and took with them several substantial advertising accounts and much of plaintiff's staff. In the *Kewiczky* case the actionable wrong was an intentional injury to business; this case is even cited for the proposition that allegations of conspiracy in a civil action serve merely to "link together" the defendants. *Levine* v. *Schaffzin*, 99 N. Y. S. 2d 254 (Sup. Ct. Kings Co. 1950). See also *O'Driscoll* v. *Sanders*, 99 N. Y. S. 2d 674 (Sup. Ct. Bx. Co. 1950).

To support the proposition that the statute of limitations runs from the date the conspiracy is concluded, petitioner repeats the cases cited by the trial judge of *Breese* v. *United States*, 203 F. 824 (4th Cir. 1913) and *Eldredge* v. *United States*, 62 F. 2d 449 (10th Cir. 1932). These cases involve a *criminal* conspiracy in which the conspiracy itself is the crime regardless of the acts done by it. The statute of limitations runs from the time the crime (the conspiracy) is completed. This is a different rule from that applicable

in civil cases. *Momand* v. *Universal Film Exchanges*, 172 F. 2d 37 (1st Cir. 1948), cert. denied 336 U. S. 967 (1949); *Green* v. *Davies*, 182 N. Y. 499 (1905).

After citing these inapplicable cases petitioner makes several *arguendos*. He states that even if there is no cause of action for conspiracy and the statute runs from each injury that nevertheless, neither of these two claims is barred. He argues that the L.L.&B. claim would be governed by the six year limitation on actions based on fraud pursuant to § 48(5) of the New York Civil Practice Act and is not barred because the fraud was not discovered until 1946. However § 48(5) has been interpreted to mean that the statute runs from the date the injured party *should* in the exercise of reasonable diligence have become aware of his claim. *Higgins* v. *Crouse*, 147 N. Y. 411 (1895); *Sielcken-Schwartz* v. *American Factors Ltd.*, 265 N. Y. 239, 192 N. E. 307 (1934); *Kelly* v. *City of New York*, 276 App. Div. 540 (1st Dep't 1950) aff'd without opinion, 302 N. Y. 589, 96 N. E. 2d 893 (1951). Petitioner cites no contrary cases. The jury expressly found petitioner should have become aware of his claim in 1931; this statute would have run in 1937; suit was not instituted until 1948.

Petitioner then states that assuming the L.L.&B. claim was barred, the Browne-Vintners claim survives because it was in fact a claim for fraud under § 48(5) of the New York Civil Practice Act and not a claim for a wrongful act done to a corporation by its former officer. (§ 48(8) N. Y. Civil Practice Act.) This is a claim by petitioner that he had an interest in the New York corporation, Browne-Vintners Co., Inc. and that because Reinfeld, its officer, caused the corporation to be sold for an inadequate price, petitioner did not (as a secret shareholder) receive his proper share. *Hastings* v. *Byllesby & Co.*, 293 N. Y.

413 (1944) and the companion case of *Hastings* v. *Byllesby & Co.*, 293 N. Y. 404 (1944) are directly in point. In these cases suit was brought by a receiver representing corporate creditors to recover for waste of corporate assets as a result of a fraudulent conspiracy between the directors of the corporation and third persons, resulting in their unjust enrichment. The New York Court of Appeals applied § 48(8) of the New York Civil Practice Act and held that the action was not one based on fraud and that the statute of limitations ran from the date of injury and not of discovery.

See also: *Public Shoe Stores, Inc.* v. *Goldstein*, 225 App. Div. 350 (1st Dep't 1929); *Zwerdling* v. *Bent*, 264 App. Div. 195 (1st Dep't 1942), aff'd without opinion, 291 N. Y. 654 (1943).

II

THE COURT OF APPEALS CORRECTLY APPLIED NEW YORK LAW IN HOLDING THAT PETITIONER'S CLAIMS WERE BARRED BY ILLEGALITY.

A. The Court of Appeals correctly applied New York law in holding that petitioner's claim based on the L.L.&B. transaction was illegal and unenforceable.

Petitioner himself refers to the L.L.&B. transaction as "the planned acquisition of the L.L.&B. Distillery by the liquor partnership in 1931, prior to the Repeal of the Prohibition Amendment" (Petition, p. 16). The so-called "liquor partnership" was, in fact, a million dollar bootleg combine. The acquisition of the L.L.&B. Distillery in Canada was admittedly a venture of the combine. Any injury resulting from the alleged conspiracy was an injury to the partnership and, in order for petitioner to recover damages as a result of this injury, he must first prove

(which he did) that he was a member of this illegal bootleg combine.

The Court of Appeals held that regardless of whether or not this particular venture was illegal that "a member of such an illegal partnership is not entitled to enforcement of any right depending on the partnership agreement. (Citations)." (Petition, Appendix A, p. 34). In *Parise* v. *Pepe*, 270 App. Div. 769, 59 N. Y. S. 2d 497 (2d Dep't 1946), cited by the Court of Appeals, plaintiff, an unlicensed partner in a package liquor store, was refused an accounting because the partnership was illegal. See also *Orr* v. *Pfohl*, 84 N. Y. S. 2d 23 (Sup. Ct. Onondaga Co. 1948); *Courtney* v. *Riordan*, 192 Misc. 53 (Sup. Ct. Erie Co. 1948).

This rule in itself makes petitioner's claim based on the L.L.&B. transaction unenforceable regardless of whether the bootleg combine planned to purchase a distillery (two years before the repeal of prohibition) to manufacture liquor for sale before or after repeal. The Court of Appeals however specifically held that the evidence was so convincing that a jury should not have been permitted to make a finding other than that the intention of the bootleggers in buying a distillery was to acquire a cheap source of bootleg liquor for illegal sale in the United States, and that even if made in Canada such a contract is unenforceable (Petition, Appendix A, p. 33). Petitioner cites no contrary authorities.

Petitioner's remaining contention with reference to the L.L.&B. transaction is that New York law holds that the repeal of prohibition makes recovery on a claim formerly unenforceable, enforceable. He cites four New York cases in support of this proposition, each decided before 1938, at which time there was confusion in New York concerning this point. However, any confusion there might have been

was ended when in 1947 the Appellate Division of the New York Supreme Court decided *Toll* v. *Friedman*, 272 App. Div. 587 (1st Dep't 1947) and held at p. 589:

> "A contract entered into in violation of law is not automatically purged of its illegality by mere repeal of the prohibitory statute. Such contracts remain illegal even after repeal and continue to be unenforcible until such time as the taint of illegality is removed. That occurs only when the Legislature manifests an intention to give them validity."

Since then, the New York courts have held that repeal does not purge an illegal contract of its illegality. *Shapiro Paper Corp.* v. *Armstrong Publications, Inc.*, 276 App. Div. 841 (1st Dep't 1949); *Dunmar Robes* v. *Buenaventura*, 279 App. Div. 286 (1st Dep't 1952); *Government of the French Republic* v. *Cabot*, 190 Misc. 517 (Sup. Ct. N. Y. Co. 1947); *Marcomo Stevedoring Corp.* v. *Nathanson*, 202 Misc. 154, 158 (Sup. Ct. Kings Co. 1951).

B. The Court of Appeals correctly applied New York law in holding that petitioner's claim based on the Browne-Vintners transaction was illegal and unenforceable.

When it became apparent the highly profitable bootlegging enterprise was doomed because of the repeal of prohibition, the bootlegging partners decided to form a legitimate enterprise for the sale of liquor.

Unfortunately for them, the state legislature placed severe restrictions on obtaining a liquor license and required that the names of all persons "interested or to become interested, in the traffic of liquor for which this application is made" be stated in the application for a liquor license. § 110 of the New York Alcoholic Beverage Control Law. (R.

2596, question 13) The gentlemen whose interest in Browne-Vintners was concealed were precisely the type the state legislature intended to prevent from trafficking in liquor. These men included not only petitioner but Abner "Longie" Zwillman (R. 268-271) and Joseph Stacher, a "reputably well known racketeer" (R. 277). Petitioner himself testified that he knowingly allowed his interest to be concealed "because I was in the bootlegging business" (R. 296).

In order for petitioner to recover for an injury to this illegally concealed interest, he had to assert rights to it. In *Flegenheimer* v. *Brogan*, 284 N. Y. 268 (1940), the New York Court of Appeals held that the administratrix of the well known bootlegger Dutch Schultz could not assert rights to capital stock of a corporation allegedly owned by Dutch Schultz but kept secret from the authorities. The Court held, at p. 272:

> "In effect then, this action is one brought by an alleged secret owner to vindicate his assertion of beneficial title to property he had parted with in order to perpetrate a fraud upon the statute which regulates and controls traffic in alcholic beverages."

Petitioner also argues that a knowingly illegally concealed interest can nevertheless be enforced, citing a case involving a milk dealer. *Rosasco Creameries, Inc.* v. *Cohen*, 276 N. Y. 274 (1937). The New York Court of Appeals however has stated that the rule with reference to liquor dealers is otherwise. *Carmine* v. *Murphy*, 285 N. Y. 413, 416 (1941).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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